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No. 00-527

IN THE

Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,
Petitioner,

v.

JENSINE BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil action challenging a state administrative decision under the Individuals with Disabilities Education Act, the district court "shall receive the records of the administrative proceedings," "shall hear additional evidence at the request of a party," and "shall grant such relief as [it] determines is appropriate" based on "the preponderance of the evidence." 20 U.S.C. § 1415(i)(2)(B).

The question presented is whether, in an IDEA proceeding, section 1415(i)(2)(B) requires the district court to hear evidence otherwise admissible under the Federal Rules of Evidence if requested to do so by a party or whether, as the court of appeals held, the district court has broad discretion to refuse to hear evidence on a variety of policy grounds, including that similar testimony was, or could have been, admitted in the state administrative hearing.

PARTIES TO THE PROCEEDING

There are no petitioners other than the one named in the caption. The respondents other than the one named in the caption are John Bennett and Denise Bennett. The other parties in the proceeding below were the Walker County Board of Education, and Jewel Campbell, Charles Helton, Mack Hunt, Margaret Johnson and Sarah McKinley, not individually, but as members of the Walker County Board of Education. See Sup. Ct. R. 14.1.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Walker County School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) was entered on February 16, 2000, and is reported at 203 F.3d 1293 (11th Cir. 2000). The order denying the petition for rehearing and rehearing *en banc* (App. 134a-35a) was entered on June 7, 2000, and is not reported. The opinion and final order of the United States District Court for the Northern District of Georgia (App. 12a-54a) were entered on February 25, 1999, and are not reported. Earlier opinions and orders of the District Court in this case were entered on January 29, 1998 (App. 110a-33a); May 22, 1998 (App. 108a-09a); and July 29, 1998 (App. 79a-107a), and are not reported. The

opinion of the Administrative Law Judge of the Georgia Office of State Administrative Hearings (App. 55a-78a) was entered on February 10, 1997, and is not reported.

JURISDICTION

The court of appeals entered its decision and judgment on February 16, 2000. Petitioners timely filed a petition for rehearing and a suggestion for rehearing *en banc* on March 8, 2000, and rehearing was denied on June 7, 2000. On August 24, 2000, petitioners timely filed an application for an extension of time to file the petition for certiorari in this case; Justice Kennedy granted petitioner's application and allowed petitioner until October 5, 2000 to file the petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2), which provides as follows:

> (2) Right to bring civil action
>
> (A) In general
>
> Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional Requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.[1]

STATEMENT OF THE CASE

1. Pursuant to the IDEA, 20 U.S.C. § 1400 *et seq.*, Congress makes federal funds available to state and local education entities. In turn, those entities are required to identify children with disabilities and to develop for each disabled student an annual individualized education program or IEP that will provide the child a "free appropriate public education." See 20 U.S.C. §§ 1400(d)(1)(A), 1414(d). Under this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), an IEP provides a free, appropriate public education if the state has complied with the procedures set forth in the IDEA and if the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. If the parents of a disabled child are not satisfied with the IEP, the IDEA requires the education agency to conduct an impartial due process hearing. 20 U.S.C. § 1415(f). Any party aggrieved by the result of the state's administrative proceedings—*i.e.*, either the parents or the school district—

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[1] The IDEA was substantially revised and reorganized in 1997, but the provisions pertinent to this appeal were not changed. *See* Individuals With Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37. The court of appeals thus cited the statute in its present form, and this petition does the same.

has the right to bring a civil action in state court or federal district court. *Id.* § 1415(i)(2).

2. Jensine Bennett was born on September 15, 1988, and identified as an autistic child in 1991, when she was three. App. 4a. She and her parents live in Walker County, Georgia. *Id.* The Walker County School District determined that Jensine was a child with a disability, due to her autism, and therefore that she qualified for special educational services under the IDEA. *Id.* The School District prepared IEPs for Jensine, and they were implemented without dispute during Jensine's preschool years, 1991-92 through 1994-95. *Id.*

In the spring of 1995, the School District prepared a proposed IEP for Jensine for the 1995-96 school year. That IEP was rejected by the Bennetts on the grounds that it did not provide a long enough extended program for the summer months, did not require occupational therapy services, and did not provide sufficient one-on-one classroom assistance. App. 4a. The Bennetts ultimately withdrew Jensine from the School District's system, enrolled her in a private school for autistic children, and notified the School District that they intended to seek reimbursement of the costs of the private schooling. *Id.*

In July 1996, the Bennetts requested a due process hearing under the IDEA. They argued that the proposed IEP did not afford Jensine a free appropriate public education as required by the IDEA and therefore that they were entitled to reimbursement for Jensine's private schooling during the 1995-96 school year. App. 5a.

3. An Administrative Law Judge was assigned to hear the case under Georgia's statutory scheme. The School District sought certain documents and other discovery related to Jensine's year of private schooling, but the State's statutory scheme does not provide for discovery and the Bennetts

would not voluntarily make any information about Jensine available to the School District. Indeed, the School District was not able to obtain, even by subpoena, the private school's records, the testimony of the private school's employees, or the testimony of Jensine's in-state evaluator prior to the hearings.

After conducting a hearing, the ALJ issued his decision in February 1997. App. 55a-78a. He held that the proposed IEP did not provide Jensine with a free, appropriate public education because it did not provide an adequate behavior management program, occupational therapy, services for a full twelve months, and communication aids. Accordingly, the ALJ ordered that the Bennetts be reimbursed for Jensine's private schooling during the 1995-96 school year. *Id.* at 77a.

4. As a party aggrieved by the decision, the School District filed a complaint in federal district court under the IDEA on March 12, 1997. Pursuant to section 1415(i)(2)(B)(ii), which provides that the court "shall hear additional evidence at the request of a party," the School District notified the court that it intended to present "additional evidence." App. 3a-6a.

In response, the court observed that "[t]he Eleventh Circuit has not yet expressed an opinion as to the proper meaning to be given the phrase 'additional evidence,' and a difference of opinion exists among the other circuit courts":

> The First, Seventh, and Ninth Circuits have adopted restrictive definitions of the word "additional," and have construed the term to mean "supplemental." . . . The Sixth Circuit, however, has repudiated the idea that "additional evidence is admissible only in limited circumstances, such as to supplement or fill in the gaps in the evidence previously introduced." Instead, the Sixth Circuit construes the terms "additional" in the following manner:
>
> > "Additional," in its ordinary usage, implies something that is added, or something that exists by way

> of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add."
>
> The Sixth Circuit's interpretation of the term "additional" thus permits the district court to consider not only evidence that "supplements" the administrative record, but also any other evidence that is relevant to the proceedings. [App. 120a-21a (citations omitted).]

The district court concluded that "the Sixth Circuit's interpretation of the term 'additional evidence'" was "persuasive" and that it was "inclined to apply the interpretation adopted by the Sixth Circuit in reviewing future motions for the admission of additional evidence, unless Defendants can convince the Court otherwise by citing appropriate authority." App. 121a. The court then denied the School District's motion to submit additional evidence as premature and required the School District to make a proffer of the evidence it wished to present at the conclusion of discovery. *Id.*

On June 15, 1998, the School District filed its motion for the consideration of additional evidence. In that motion, it provided the court with a list of witnesses (whose testimony would be presented by personal appearance, deposition, or affidavit) and three categories of tangible or documentary evidence that it would introduce. It showed that this evidence was "relevant to the proceedings," as the court had required.

The district court ruled on the motion on July 29, 1998. It once again laid out the conflict among the courts of appeals on the "proper meaning to be given the phrase 'additional evidence.'" App. 88a. But, in this decision, the court stated that "[a]fter further reflection," it would "clarif[y] its position to emphasize that the Court does not believe that the broader interpretation of the term 'additional' adopted by the Sixth Circuit entitles a party to an unlimited opportunity to introduce additional evidence on review of the administrative hearing officer's decision," because that "effectively would

permit parties seeking a review . . . to obtain a trial *de novo* in the district court." *Id.* at 88a-89a. The district court therefore adopted a new standard, purporting to combine the Sixth Circuit's approach with the restrictive approach employed by the First Circuit and those following it. After articulating this standard, the court refused to consider virtually all of the School District's additional evidence on the grounds that the proposed witnesses "(1) previously testified at the administrative hearing; (2) did not testify at the administrative hearing, but were available to testify at the administrative hearing; or (3) will offer testimony that is identical to testimony previously offered by other witnesses at the administrative hearing." *Id.* at 90a. The lone exception to the court's exclusion of the School District's additional evidence was the deposition testimony of a single witness, Lee Ann Shelton, concerning Jensine's progress at her private school after the date of the administrative hearing. *Id.* at 96a-97a. In denying the School District's motion for reconsideration, the district judge stated that "the Court did not 'guarantee' that the Court would use a particular standard when determining whether to admit additional evidence." R7-50-7.

On February 9, 1999, after the School District was permitted to respond to the new standard by providing a specific description of one category of documents whose admission had been denied, the court entered an order permitting the School District to introduce certain additional documents related to Jensine's enrollment in private school. App. 32a. The court did *not* permit the School District's proffered lay and expert testimony regarding the significance of the private school records in demonstrating that its proposed IEP did provide a free, appropriate public education. Nor did the court allow cross-examination of witnesses regarding these records which had been unavailable during the administrative proceedings.

On February 25, 1999, the district court entered its final order in this case. It explained that it would "review the administrative record and the additional evidence" and "render a decision on the parties' appeal from [the] administrative decision based on a preponderance of the evidence." App. 34a. The court found that the ALJ had clearly erred when he compared the relative merits of the private school and public school plans for Jensine, when he should have been independently evaluating the appropriateness of the public school program. *Id.* at 45a. Nonetheless, the court ultimately affirmed the ALJ's decision that "the 1995-96 IEP was not reasonably calculated to provide Jensine with educational benefit," because "[it] did not contain a provision concerning increased one-on-one instruction"; "failed to provide adequate procedures for addressing Jensine's self-abusive behavior"; and failed to provide a long enough summer program. *Id.* at 46a-47a. The court concluded that the private school was an appropriate placement for Jensine, and ordered that the Bennetts' costs for 1995-96 be reimbursed. *Id.* at 51a.

5. The court of appeals affirmed. It identified the critical issue as "[w]hat standard should be applied in deciding what 'additional' evidence, if any, should be admitted in the district court proceeding." App. 7a. It described the "leading decision" as *Town of Burlington* v. *Department of Education*, 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985). There, the court "construe[d] 'additional' in the ordinary sense of the word to mean supplemental." *Id.* at 790 (internal citation omitted). The Eleventh Circuit "agree[d] with this well reasoned resolution of the issue by the First Circuit" and "align[ed itself] with the Seventh and Ninth Circuits in adopting the same holding." App. 10a (citing cases). The court further characterized the Third and Eighth Circuits as adopting "restrictive approach[es]" to the issue without adopting *Town of Burlington*.

The court of appeals recognized that *Town of Burlington* had been rejected by the Sixth Circuit in *Metropolitan Government of Nashville & Davidson County* v. *Cook*, 915 F.2d 232 (6th Cir. 1990), but, with little explanation, characterized the distinction between the tests as "more semantical than substantive." App. 11a. Then, the court stated without elaboration that applying its construction of the statute, the district court acted within its discretion in excluding most of the additional evidence proffered by the School District. *Id.* On the merits, the court of appeals simply affirmed the district court's decision holding that the proposed IEP did not provide Jensine with a free, appropriate public education without any discussion. *Id.*

REASONS FOR GRANTING THE PETITION

Every year school districts across the nation prepare thousands of IEPs. Numerous administrative challenges to those IEPs are filed annually in the 50 state administrative systems that process IEP challenges. Those systems offer widely varying amounts of process to parents and school districts in disputes about the appropriateness of IEPs. When those disputes make their way to court, however, the IDEA, a federal statute, sets forth the process for bringing a civil action with respect to the state's decision approving or disapproving an IEP. Accordingly, in court, a single set of procedural rules should govern in IDEA cases.

That is not, however, the reality today. There is an acknowledged conflict among the courts of appeals on what constitutes "additional evidence" that courts must consider in deciding whether an IEP provides a free, appropriate public education within the meaning of the IDEA. See 20 U.S.C. § 1415(i)(2)(B)(ii). The First Circuit, followed by the Fourth, Seventh, Eighth, Ninth and now the Eleventh Circuits, has adopted a restrictive view of the meaning of the phrase

"additional evidence," while the Sixth Circuit and the Third Circuit employ a much broader construction.

The uniform and proper interpretation of this provision of the IDEA is critical to its fair and effective functioning. The federal rights of students, parents, and school districts should not receive less protection simply because those individuals and entities live in Georgia rather than in Ohio. Moreover, the IDEA reflects a congressional determination that *courts* are to reconcile and balance the federal interest in ensuring that disabled children have appropriate IEPs with the state interest in deciding which educational policies, practices and approaches will be used to educate disabled children. See *Rowley*, 458 U.S. at 207-08. Courts can only do so if they have all relevant evidence before them and if they engage in *de novo* decision making, and the IDEA provides for both. But that purpose is subverted, and judicial oversight cannot be effective, if the phrase "additional evidence" is given the rigid, narrow definition adopted by the court below and the other circuits that follow *Town of Burlington*. The importance of this issue is further highlighted by its recurrent nature: Numerous IEPs are challenged every year.

Finally, the decision below is wrong. It ignores the plain meaning, legislative history, and purpose of the statute. It substitutes the review provided under the Administrative Procedure Act for the civil action and *de novo* consideration of a full record mandated by Congress and embodied in Spending Clause legislation.

This Court should grant the petition to resolve the conflict among the federal courts of appeals on this recurring question and to ensure the proper, fair, and effective administration of an important federal statute.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ABOUT THE MEANING OF THE REQUIREMENT THAT DISTRICT COURTS REVIEWING IEP DETERMINATIONS CONSIDER ADDITIONAL EVIDENCE.

In this case construing section 1415(i)(2) of the IDEA, the Eleventh Circuit chose to follow the decision of the First Circuit in *Town of Burlington*. It therefore held that the IDEA requirement that, in a civil action challenging a state administrative IEP decision, a district court "shall hear additional evidence at the request of a party" means only that the district court may, in its discretion, hear "supplemental" evidence proffered by a party. See *Town of Burlington*, 736 F.2d at 790 ("[w]e construe 'additional' in the ordinary sense of the word to mean supplemental") (citation omitted); *id.* at 791 ("[t]he determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*"). In so doing, the Eleventh Circuit joined the Fourth, Seventh and Ninth Circuits which employ the *Town of Burlington* standard. See *Springer* v. *Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998); *Monticello Sch. Dist.* v. *George L.*, 102 F.3d 895, 901 (7th Cir. 1996); *Ojai Unified Sch. Dist.* v. *Jackson*, 4 F.3d 1467, 1473 & n.7 (9th Cir. 1993); *Capistrano Unified Sch. Dist.* v. *Wartenberg*, 59 F.3d 884, 889 (9th Cir. 1995). Cf. also *Indep. Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 560 (8th Cir. 1996) (requiring the party seeking to submit "additional evidence" to provide notice to the court and a "solid justification" for expansion of the administrative record).

In marked contrast, the Sixth Circuit has expressly declined to adopt the approach of the First Circuit and hold that "additional evidence is admissible only in limited

circumstances, such as to supplement or fill in gaps in the evidence previously introduced." *Cook*, 915 F.2d at 234. Instead, that court applies the statute's plain meaning, saying:

> "Additional," in its ordinary usage, implies something that is added, or something that exists by way of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add." [*Id.*]

See also *Metro. Bd. of Pub. Educ.* v. *Guest*, 193 F.3d 457, 463 (6th Cir. 1999) (reaffirming *Cook* and explaining that it "adopted a broad interpretation of the term 'additional'" in its interpretation of the "statutory mandate to accept additional evidence"). And, without expressly adopting *Cook*, the Third Circuit reversed a district court decision summarily excluding the consideration of additional evidence and held that, in reviewing IEP decisions, the district court should consider any evidence that will "assist the court in ascertaining whether Congress' goal has been, and is being reached for the child involved." *Susan N.* v. *Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995). See *id.* (explaining that, on remand, the district court must consider "evidence relevant, non-cumulative and useful in determining whether Congress' goal has been reached"). This standard for consideration of "additional evidence" is at least as broad as that set forth in *Cook*.[2]

The difference between the approaches adopted in *Town of Burlington* and *Cook* is substantial and important. For example, here the School District sought to present the testimony of witnesses who had not appeared in the state administrative proceeding, and their testimony was excluded under the *Town of Burlington* test simply because *other*

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[2] The court of appeals below cited *Susan N.* as adopting a restrictive approach to the meaning of the phrase "additional evidence," but, as the description in text and a fair reading of the opinion reveal, this is wishful thinking.

witnesses in the state administrative proceeding had already testified on the same topic or because these witnesses could have been called during the state administrative proceeding and were not. App. 88a. Similarly, in the federal action, the School District sought to cross-examine individuals who had testified during the state administrative proceeding based on documents that had not previously been available due to the lack of discovery at the administrative level. This, too, was not permitted. Under the *Cook* test, much of the School District's proffered evidence would have been considered, and the district court could have fulfilled its statutory mandate to consider "additional evidence" when requested and to conduct the *de novo* proceeding required under this Court's decision in *Rowley*, 458 U.S. at 205.

Due to the unique nature of the IDEA and the judicial process that it mandates, "there appears to be confusion as to the exact nature of the IDEA proceedings before the district courts." *Kirkpatrick* v. *Lenoir County Bd. of Educ.*, 216 F.3d 380, 385 & n.4 (4th Cir. 2000). See also Terry Jean Seligman, *Not As Simple As ABC: Disciplining Children With Disabilities Under The 1997 IDEA Amendments*, 42 Ariz. L. Rev. 77, 127 n.30 (2000) (describing the conflict among the courts of appeals on the "circumstances under which they will hear additional evidence"). This Court should grant the petition to resolve the conflict among the circuits on this important and oft-recurring question.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

Every year school districts prepare thousands of IEPs; every year parents challenge many of those IEPs in state administrative proceedings, and these disputes are ultimately the subject of litigation in federal district court. In virtually every such case, the district court must consider whether to

admit "additional evidence." The legal issue presented in this case is certain to recur frequently.

The resolution of this question is also critically important to the fulfillment of Congress' purpose in crafting the judicial proceedings under the IDEA. In crafting the IDEA, Congress sought to balance its interest in funding free, appropriate education for disabled students with its intent to leave decisions about education policy, practices and approaches with the states. *Rowley*, 458 U.S. at 200-04, 207-08. To ensure that its decision about the appropriate balance was properly and uniformly carried out, Congress created a unique proceeding for judicial action in response to state administrative decisions about IEPs.

The initial decision whether an IEP is lawful is made by a state administrative agency. Federal courts generally review the decisions of administrative agencies based solely on the administrative record and under the well established arbitrary-and-capricious standard of review. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The IDEA provides a fundamentally different approach. It allows a great deal of variation in the states' administrative proceedings,[3] and places the judiciary in an important oversight role. Specifically, the Act authorizes parties aggrieved by the result of a state administrative proceeding not to appeal or to file a petition for review, but to bring a "civil action." 20 U.S.C. § 1415(i)(2)(A). In such an action, the court "receive[s]" the administrative record, but the Act also provides that the court "*shall* hear additional evidence at the request of a party," shall "bas[e] its decision on the preponderance of the

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[3] For example, in Georgia, the administrative hearing officers are attorneys, while in other states the role is filled by educators. *See, e.g.*, *Mayson* v. *Teague*, 749 F.2d 652 (11th Cir. 1984) (approving the use of educators not involved in developing a child's IEP or a state IEP policy as hearing officers); *Leon* v. *Michigan Bd. of Educ.*, 807 F. Supp. 1278 (E.D. Mich. 1992) (noting the use of attorneys).

evidence," and "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(B)(ii) & (iii) (emphasis supplied). This Court has explained that, although the administrative agency findings are entitled to "due deference," the civil action is considered "*de novo*." *Rowley*, 458 U.S. at 205.[4]

In this context, the court of appeals' restrictive definition of the phrase "additional evidence" is manifestly contrary to the purpose of the IDEA's civil action provisions. These provisions do not call for traditional review of agency action, but for traditional judicial action on a civil claim after discovery under the Federal Rules of Civil Procedure and the consideration of all relevant evidence. Congress deemed such a scheme necessary to protect the balancing of state and federal interests in the IDEA, and its mandate that judges create and then rule on a full record is demonstrably undermined by a crabbed construction of the phrase "additional evidence." Cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S 104, 113-14 (1991) ("our reading of the [Age Discrimination in Employment Act] will provide no more than a second chance to prove the claim, and even then state administrative findings may be entered into evidence at trial. It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment").

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[4] Judicial proceedings under the IDEA are thus analogous to judicial proceedings under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) (where an employee's discrimination claim has been the subject of arbitration with a high level of procedural fairness, the court must "consider the employee's claim *de novo*" and "accord [the arbitral decision] such weight as the court deems appropriate"). *Cf. Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 795-96 (1986) (holding that state administrative agency findings do not have a preclusive effect in Title VII proceedings before the EEOC or in federal court and that such claimants are entitled to trial *de novo*).

The court of appeals' approach also will result in fundamental unfairness for children, parents, and school districts in some states. Many states, including Georgia, allow limited or no discovery in administrative proceedings, see Ga. Comp. R. & Regs. r. 616-1-2-.38 (1999); or have laws making certain types of records confidential, see Ga. Code Ann. §§ 24-9-21(5)-(8), 24-9-40 *et seq.*, 43-39-16 (2000). See also 20 U.S.C. § 1232g(b) (confidentiality of education records). In such states, the administrative record may be incomplete, and the federal civil action may be a party's first opportunity to discover evidence and incorporate that evidence into its case. In this case, for example, the School District was unable to subpoena out-of-state witnesses for deposition or testimony at the administrative hearing or to discuss certain confidential records with third-party witnesses. Yet, applying the court of appeals' narrow definition of "additional evidence," a court can refuse to consider such evidence in a direct case or for use in cross-examination on the grounds that other witnesses provided similar testimony in the administrative proceeding or that a witness has already testified and been cross-examined. See, *e.g.*, App. 88a. These state-by-state variations in administrative proceedings were meant to be smoothed away by the civil actions provided for in the Act.[5]

Finally, the court of appeals' approach will have the undesirable consequence of turning administrative proceedings about IEPs into pitched battles. If courts are less likely to admit and consider "additional evidence," then the parties will have to ferret out and incorporate into the administrative record all evidence supporting their arguments and countering those of their opponents. In addition, parties who would not otherwise have hired attorneys for an administrative

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[5] Indeed, all states must have in place administrative proceedings to air and resolve disputes about IEPs on a tight 45-day timeline, 20 U.S.C. § 1415, making the statutory safety net that provides for discovery, additional evidence, and full consideration even more important.

proceeding (generally, parents) will have to do so to protect their rights. The structure of the IDEA, however, strongly indicates that Congress intended to allow states to conduct formal or informal administrative proceedings, secure in the knowledge that judicial oversight would protect the federal balance of interests embodied in the Act.

The issue presented by this case is important and recurring and this Court's review is therefore warranted.

III. THE COURT OF APPEALS' CONSTRUCTION OF THE IDEA IS WRONG.

The statutory provision at issue states that aggrieved parties "shall have the right to bring a civil action" and that, in such an action, the court "*shall* hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(A) & (B)(ii) (emphasis supplied). The IDEA expressly provides that a court action under the IDEA is a "civil action" in the usual sense of the term—*i.e.*, not an appeal or a petition for review based on an administrative record. See Fed. R. Civ. P. 2 ("[t]here shall be one form of action to be know as 'civil action'").[6]

The statutory language also clearly requires the courts to admit and consider evidence that is not in the administrative record upon the request of a party. It does not restrict or limit a party's evidentiary presentation. To the contrary, the word "shall" expresses "what is mandatory." *Merriam Webster's Collegiate Dictionary* 1076-77 (10th ed. 1996). The word "additional" is used to describe those things "existing by way of addition" or "increase." *Id.* at 13. See also *Cook*, 915 F.2d at 234 ("'additional', in its ordinary usage, implies something that is added, or something that exists by way of addition. To 'add' means to join or unite; the limitation on what can be

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[6] Compare these provisions with other sections of the IDEA authorizing only appeals, *e.g.*, 20 U.S.C. § 1415(i)(1)(A).

joined inherent in the term 'supplement' is not present in the term 'add'"). And the phrase "at the request of a party" carries a strong implication that it is the court's discretion to deny admission that is being restricted. The plain language of the statute is therefore directly contrary to the narrow construction adopted by the court below and all other courts following the *Town of Burlington* standard. Under this provision, federal courts may exclude evidence only on the grounds that it does not satisfy the generally applicable requirements that it be relevant and not be needlessly cumulative. See Fed. R. Evid. 402, 403.[7]

The language mandating judicial oversight based on a full record receives support from the legislative history. The original bill for the IDEA approved by the House of Representatives made the findings of fact of a state administrative hearing officer "conclusive." This provision was eliminated in the final version of the IDEA, and replaced with current statutory language. See *Rowley*, 458 U.S. at 205 ("[i]n substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make 'independent decisions based on a preponderance of the evidence'") (quoting S. Conf. Rep. No. 94-455, at 50 (1975)).

Finally, we showed above that the Eleventh Circuit's construction of the IDEA contravenes the congressional policy and purposes embodied in the civil action provision, see *supra* at 15, and we will not repeat that argument here. A

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[7] The Eleventh Circuit's holding that a district court has "broad discretion" to decide what is "additional evidence" is not consistent with the language of the Act and is "less than faithful to [the courts'] obligation to construe what Congress has written . . . by concluding that Congress had imposed upon the [parties] a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." *Rowley*, 458 U.S. at 190 n.11.

broad interpretation of the "additional evidence" provision is required not only by the language and legislative history of the statute, but also by the congressional purposes to be served by the IDEA's authorization of a judicial action.

The court of appeals has wrongly construed an important federal statute and, in so doing, has deepened an already mature conflict among the courts of appeals. This Court should grant the petition to correct this error and end the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2000

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APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 99-10140

WALKER COUNTY SCHOOL DISTRICT,
JEWEL CAMPBELL, *et al.*,
Plaintiffs-Counter-defendants-Appellants,

v.

JENSINE BENNETT, a minor, by and through her parents and legal guardians, JOHN & DENISE BENNETT,
JOHN BENNETT, DENISE BENNETT,
Defendants-Counter-claimants-Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

Feb. 16, 2000

Before BIRCH and HULL, Circuit Judges, and HODGES*, Senior District Judge.

HODGES, Senior District Judge:

This appeal involves the Individuals with Disabilities Education Act (the IDEA), 20 USC § 1400 et seq.[1] The court is required to interpret one of the provisions of the Act that

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* Honorable Wm. Terrell Hodges, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

[1] The Act was substantially revised and reorganized in 1997 by Pub.L. 105-17, June 4, 1997, 111 Stat. 37. However, the provisions pertinent to this appeal were not changed. This opinion will therefore cite the statute in its present form. 20 USC §1400 *et seq.*

has been the subject of attention by several other circuits, but not this one.

The stated purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 USC § 1400(d)(1)(A). To effectuate that purpose federal funds are made available to state and local educational entities[2] which are required through an evaluation process to identify children with disabilities[3] and to develop for each disabled child an annual individualized education program or IEP.[4] If the parents of a disabled child are dissatisfied with their child's IEP, the statute requires the educational agency to afford them an impartial due process hearing.[5]

Any party aggrieved by the result of the administrative proceedings in the state system has the right, under § 1415(I)(2), to bring a civil action in the district court, and

> In any action brought under this paragraph, the court—
>
> (i) shall receive the records of the administrative proceedings;
>
> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The Walker County School District was aggrieved by the result of administrative proceedings initiated under the Act by

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[2] *See* 20 USC § 1411.

[3] *See* 20 USC § 1414.

[4] *See* 20 USC § 1414(d).

[5] *See* 20 USC § 1415(f).

the parents of Jensine Bennett. The Administrative Law Judge required the School District to reimburse the Bennetts for the cost of Jensine's private schooling during the 1995-96 school year. The School District then brought this action in the district court under § 1415(I)(2) of the Act seeking review and reversal of that administrative decision. Invoking the statutory mandate that the court "shall hear additional evidence at the request of a party," the School District proposed that the district court hear a substantial volume of testimonial and documentary evidence in addition to the record of the administrative proceedings developed in the state system. The district court refused to receive most of that evidence and, acting on the existing record, proceeded to affirm the administrative decision. This appeal followed.

Two issues are presented. First is the question whether the district court erred in refusing to receive and consider the evidence the School District wished to offer in addition to the record of the administrative proceedings.[6] The second issue is whether the district court erred in its judgment on the merits affirming the decision of the Administrative Law Judge.[7]

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[6] To the extent this issue involves a question of law—the interpretation of the statute—our review is *de novo*. *E.g., United States v. Gilbert*, 136 F.3d 1451 (11th Cir.1998); *Rodriguez v. J.D. Lamer*, 60 F.3d 745, 747 (11th Cir.1995); *Morris v. Haren*, 52 F.3d 947, 949 (11th Cir.1995). To the extent the issue involves the district court's evidentiary rulings, i.e., application of the properly construed statute in admitting or excluding evidence, we review those rulings for abuse of discretion. *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir.1998).

[7] To the extent the district court found, as did the ALJ, that the 1995-96 IEP developed for Jensine failed to comply with the Act, the issue presents a mixed question of law and fact subject to *de novo* review. *JSK v. Hendry County School Board*, 941 F.2d 1563, 1571 (11th Cir.1991). The district court's specific findings of fact are reviewed for clear error. *See e.g., Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857 (11th Cir.1988), *reh'g denied* 864 F.2d 795 (11th Cir. 1988).

We affirm the district court in both respects and conclude that we need to discuss only the evidentiary question as an issue of first impression in this circuit.

I

Jensine Bennett was born on September 15, 1988 and was eight years old when this suit was brought in March, 1997. She was identified as an autistic child in 1991 when she was three years old. Jensine and her parents lived at the time, and still live, in Walker County, Georgia. The Walker County School District determined that Jensine, because of her autism, was a child with a disability and was qualified for special educational services under the IDEA. An individualized educational program (IEP) was prepared and implemented for her without formal dispute during Jensine's preschool years, 1991-92 through 1994-95.

In her kindergarten class during the 1994-95 school year, Jensine sporadically engaged in self abusive acts, experienced other episodes of emotional outbursts, and lacked focus on classroom tasks. In the spring of 1995 the School District prepared a proposed IEP for Jensine with respect to the 1995-96 school year. Meetings were held in June and August, 1995, but the proposed IEP was rejected by the Bennetts because, in their view, among other things, it did not provide an extended program during the summer months, and did not afford occupational therapy services or sufficient one-on-one classroom assistance to cope with Jensine's autistic frustration. The Bennetts thus declined the School District's 1995-96 IEP, withdrew Jensine from the District's school system, enrolled her in a private school for autistic children, and gave notice to the District that they intended to seek reimbursement of the costs of that private schooling.[8]

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[8] This court has recognized that reimbursement is an available remedy when the public school IEP is found to be statutorily insufficient and the private schooling chosen by the parents of a disabled child is found to be

In July, 1996, the Bennetts requested a due process hearing under the IDEA to press their claim for reimbursement of the expense of Jensine's education during the 1995-96 school year.[9] This placed in issue whether the School District's proposed IEP for Jensine during that year was sufficient to provide her a "free appropriate public education" as required by the Act, § 1400(d)(1)(A).[10]

The Administrative Law Judge assigned to hear the case under Georgia's statutory scheme held a two day hearing in December, 1996. Extensive documentary evidence was presented and the testimony of both lay and expert witnesses was heard. The ALJ issued his decision in February, 1997. He found, as contended by the Bennetts, that the 1995-96 IEP prepared for Jensine by the School District did not comply with the IDEA as interpreted by the Supreme Court in *Rowley* and did not fulfill Jensine's right to a free appropriate public education. Specifically, the IEP was found to be deficient because it failed to provide (1) behavior management; (2)

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appropriate. *See e.g., Jefferson County Board of Education*, 853 F.2d at 857.

[9] The ALJ and the district court found that there was no applicable period of limitations and no laches on the part of the Bennetts in asking for the due process hearing some eleven months after their rejection of the 1995-96 IEP. No issue concerning that conclusion is presented or decided on this appeal.

[10] This court has previously held, following *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) and *Todd D. v. Andrews*, 933 F.2d 1576, *reh'g denied*, 943 F.2d 1316 (11th Cir.1991), that each child and his or her IEP must be examined individually in determining whether the child has been provided "a basic floor of opportunity" that affords "some" educational benefit. The outcome need not maximize the child's education; adequacy must be determined on a case by case basis in the light of the child's individual needs. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 198, 203, 204, n. 26, 102 S.Ct. 3034, 3046, 3049 and n. 26, 73 L.Ed.2d 690 (1982).

occupational therapy; (3) extended services for twelve months; and (4) communication aids. The Bennetts were therefore awarded the costs of Jensine's private school education for the 1995-96 school year.

II

In the district court the School District moved for an evidentiary hearing to present "additional evidence." The court required a proffer of the evidence the School District wished to present. The School District responded by listing the names of nineteen witnesses (whose testimony was variously offered through the means of personal appearance, depositions or affidavits), plus three categories of tangible or documentary evidence. The district court then reviewed each item of the proffer, separately and individually. The court found that five of the witnesses had already testified to the same general subject matter at the administrative hearing, and that the proposed testimony of several of the remaining witnesses was already in the record in the form of their written reports or the testimony of other witnesses who had described their findings, so that, in either case, the proposed testimony before the district court would be cumulative. In two instances the court found the proffered testimony to be irrelevant. The court also found that all of the proffered witnesses who had not already testified were available at the time of the administrative hearing; that no explanation was given for not calling them at that time; and that permitting them to be called in the district court would raise the dual concerns of unfairly permitting the parties to reserve their best evidence for trial while essentially converting an administrative review proceeding into a trial *de novo*. Thus, with two minor exceptions, the district court concluded that the admission of any of the additional evidence in the judicial review proceedings would not only be cumulative but would undercut or unduly minimize the statutory role of the administrative process thereby resulting in an unnecessary

expenditure of judicial resources. In the end, therefore, the district court excluded all of the School District's proffered evidence except for a portion of the deposition testimony of one witness and some additional documentary evidence.

III

Ordinarily, one expects judicial review of an administrative decision to be limited to the record before the administrative body, and for the court to be required to affirm if substantial evidence in the record supports the administrative determination. *See Capistrano Unified School District v. Wartenberg*, 59 F.3d 884, 891 (9th Cir.1995). But the IDEA provision for judicial review has been described as "puzzling" (*id.* at 898) and "somewhat confusing." *Jefferson County Board of Education v. Alabama Department of Education*, 853 F.2d 853, 856 (11th Cir.1988), because it differs from the norm in a way that produces three distinct issues: (1) How much deference, if any, should be given to the administrative decision if additional evidence may be taken and the standard to be applied is the preponderance of the evidence? (2) What standard should be applied in deciding what "additional" evidence, if any, should be admitted in the district court proceeding? And (3) What is the appropriate procedural mechanism to be implemented in the district court in bringing the case before the court for a final decision? [11]

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[11] Both the Sixth and the Ninth Circuits have noted that a motion for summary judgment under Federal Rule of Civil Procedure 56 may not be an appropriate procedural device for triggering a district court decision because the district court in reviewing the administrative record, whether additional evidence is taken or not, must weigh and decide disputed issues of fact, an improper exercise under Rule 56. *Compare Capistrano*, 59 F.3d at 891-92 *and Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 387 n. 2 (6th Cir.1998). Though the point seems arcane, it could be important in its influence upon the choice of the correct standard of review on appeal. The issue is not presented by this appeal and will be left for another day.

The first of these issues was the focus of the Supreme Court's decision in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), and has since received the attention of this Court in *Jefferson County Board of Education v. Alabama Department of Education*, 853 F.2d 853 (11th Cir.1988), and *Doe v. Alabama Department of Education*, 915 F.2d 651 (11th Cir.1990). Essentially, the law is established by *Rowley* that the administrative decision in an IDEA case is entitled to due weight and the court must be careful not to substitute its judgment for that of the state educational authorities. Still, under *Jefferson County Board of Education* and *Doe*, the extent of the deference to be given to the administrative decision is left to the sound discretion of the district court which must consider the administrative findings but is free to accept or reject them.

It is the second of these issues that must now be decided in resolving this appeal. The leading decision on point is the opinion of the First Circuit in *Town of Burlington v. Department of Education*, 736 F.2d 773, 790-791 (1st Cir.1984), *aff'd.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). The Court held:

> We believe that the key to the review authorized by the Act lies in the additional evidence clause. We construe "additional" in the ordinary sense of the word, *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979), to mean supplemental. Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as Rowley requires. *Rowley* [sic] 458 U.S. at 206, 102 S.Ct. at 3051.
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> * * * * *

A trial court must make an independent ruling based on the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

* * * * *

We decline to adopt the rule urged by defendants that the appropriate construction is to disallow testimony from all who did, or could have, testified before the administrative hearing. We believe that, although an appropriate limit in many cases, a rigid rule to this effect would unduly limit a court's discretion and constrict its ability to form the independent judgment Congress expressly directed.

* * * * *

The determination of what is "additional" evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo. A practical approach, we believe, is that an administrative hearing witness is rebuttably presumed to be foreclosed from testifying at trial. A motion may then be made to allow such a witness to testify within specified limits stating the justification for the testimony. In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not

> allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. The Court should look with a critical eye on a claim, such as made here, that the credibility of a witness is a central issue. The claim of credibility should not be an "open sesame" for additional evidence. Such an approach followed by a pretrial order that identifies who may testify and limits the scope of the testimony will enable the court to avoid a trial de novo. (internal citations omitted)

We agree with this well reasoned resolution of the issue by the First Circuit and now align this court with the Seventh and Ninth Circuits in adopting the same holding.[12] *See Monticello School District v. George L.*, 102 F.3d 895, 901 (7th Cir.1996), and *Ojai Unified School District v. Jackson*, 4 F.3d 1467, 1473 and n. 7 (9th Cir.1993), *cert. denied*, 513 U.S. 825, 115 S.Ct. 90, 130 L.Ed.2d 41 (1994). *See also Susan N. v. Wilson School District*, 70 F.3d 751, 759-60 (3d Cir.1995), and *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 560 (8th Cir.1996), in which the Third and the Eighth Circuits take a restrictive approach to the issue without expressly adopting the rule of *Town of Burlington*.

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[12] It should also be noted that the enumeration of factors given by the First Circuit in *Town of Burlington* as possible reasons for supplementation of the evidence is a non-exhaustive list. The availability or unavailability of discovery procedures in the state administrative system, for example, might properly influence the extent to which the district court allows discovery in the review proceedings before deciding whether to admit or refuse any proffered evidence. The district court also has broad discretion, in our view, with respect to the form in which any supplemental evidence is received, i.e., deposition transcripts or affidavits in lieu of personal appearance.

The only criticism of the *Town of Burlington* holding, which we adopt today, comes from the Sixth Circuit in *Metropolitan Government of Nashville and Davidson County v. Cook*, 915 F.2d 232 (6th Cir.1990). The court there declined to approve the First Circuit's definition of "additional" to mean "supplemental" evidence; but the ultimate holding in *Cook* left the admission or exclusion of evidence in an IDEA proceeding to the sound discretion of the district court so that the difference between the First and Sixth Circuits on this point would seem to be more semantical than substantive. *See id.* at 234-35.

IV

Applying our construction of the statute to the evidentiary rulings made by the district court, we have no hesitancy in concluding that the court acted well within its discretion, and for the reasons it gave, in admitting and excluding the evidence proffered to it by the School District. We also approve the procedure followed by the district court in requiring a detailed proffer from the proponent of the additional evidence so that an appropriate determination could be made concerning its admissibility under the statute as we have construed it.

Finally, on the merits, we conclude that the district court did not err in its decision that the School District is required to reimburse the Bennetts for the costs of educating Jensine at the Orange Grove Center during the 1995-96 school year.

The judgment of the district court is in all respects AFFIRMED.

APPENDIX B

[Filed Feb. 25, 1999]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION FILE NO. 4:97-CV-0054-HLM

WALKER COUNTY SCHOOL DISTRICT, JEWEL CAMPBELL, CHARLES HELTON, MACK HUNT, MARGARET JOHNSON, and SANDRA MCKINLEY, in their official capacities as members of the Walker County Board of Education, and WALKER COUNTY BOARD OF EDUCATION,

Plaintiffs,

v.

JENSINE BENNETT, JOHN BENNETT, and DENISE BENNETT,

Defendants.

ORDER

This is an Individuals With Disabilities in Education Act ("IDEA") case in which Plaintiffs appeal from a State administrative law judge's decision that Plaintiffs failed to provide Defendant Jensine Bennett with a free, appropriate public education. The case is before the Court on Defendants' Renewed Motion for Final Judgment and Relief on *De Novo* Review [38].

I. Background

A. Legal Background

The Individuals With Disabilities in Education Act ("IDEA"), formerly known as the Education for All Handicapped Act ("EHA"), 20 U.S.C.A. §§ 1400-1485, provides federal funds to State and local agencies for the

education of disabled children.[1] As a condition of receiving these funds, State and local agencies must implement the substantive and procedural requirements of the IDEA. §§ 1411-1412. The IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes public education and related services designed to meet their unique needs." § 1400(c). To satisfy its duty to provide a free, appropriate public education, a school system must provide "'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982)).

To satisfy the IDEA's "personal instruction" requirement, State and local education agencies must provide each disabled child with an individualized education program ("IEP") tailored to the needs of the particular child. § 1414(a)(5); *Doe*, 915 F.2d at 654. The IEP "is developed as a written statement for each child in a meeting between the teacher, [the] parents or guardian, and local educational agency representatives." *Doe*, 915 F.2d at 654; § 1401(a)(19). The IEP must contain statements detailing: (1) the child's present

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[1] In 1997, Congress amended the IDEA. Individuals With Disabilities in Education Act Amendments of 1997, Pub. L. No. 105-18, 11 Stat. 37 (1997) . All of the events giving rise to this lawsuit occurred before Congress enacted the IDEA's amendments. Under similar circumstances, the Fifth Circuit applied the pre-amendment version of the IDEA. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F. 3d 245 , 245 n.1 (5th Cir. 1997) ("As all of the events giving rise to this action occurred before the enactment of the amendments, however, we need not consider their effect in this appeal."), *cert. denied*, 118 S. Ct. 690 (1998). The Court follows the Fifth Circuit's approach and applies the pre-amendment version of the IDEA to this case. The Court's citations to the IDEA therefore are to the pre-amendment version of the statute.

educational performance level; (2) annual goals, including short-term instructional objectives, for the child; (3) specific educational services to be provided; (4) needed transition services; (5) the projected initiation dates and anticipated duration of services; and (6) objective criteria and evaluation procedures for assessing achievement of instructional objectives. § 1401(a)(19). The State or local education agency must review each IEP annually, and the State or local educational agency must notify parents of any changes in the child's evaluation or placement. *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 929 (11th Cir. 1989); § 1415(b)(1)(C); 34 C.F.R. § 300.343. Additionally, the IEP must be in effect at the beginning of each school year. 34 C.F.R. § 300.342(a).

The regulations interpreting the IDEA provide that the State or local education agency is responsible for conducting a meeting "for the purpose of developing, reviewing, and revising the IEP of a child with a disability." 34 C.F.R. § 300.343 (a). The agency must hold a meeting to review and, if appropriate, must revise each child's IEP at least once a year. 34 C.F.R. § 300.343(d). The agency must ensure that each meeting includes one or both of the child's parents. 34 C.F.R. § 300.344(a)(3). The agency may conduct the meeting without a parent if it cannot convince a parent to attend the meeting. 34 C.F.R. § 300.345(d).

The IEP also must "be in effect before special education and related services are provided to a child." 34 C.F.R. § 300.342(a). The IDEA defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals or institutions." § 1401(a)(16). Related services:

> means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

§ 1401(a)(17) . Related services and special education also may include services after the end of the school year or services throughout the summer months and other vacations if a child requires these services. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1213 (1984), *modified and reinstated*, 740 F.2d 902 (11th Cir. 1984).

The IDEA also provides procedural safeguards for parents, children, and state or local educational agencies. First, parents and children may present "complaints with respect to any matter relating to the identification, evaluation, or education of the child, or the provision of a free appropriate public education to such child." § 1415(b)(1)(E). Second, parents are entitled to prior written notice "whenever an educational agency proposes or refuses to initiate a change in the evaluation or educational placement of their child or the provision of a free appropriate public education to the handicapped child." *Doe*, 915 F.2d at 655; § 1415(b)(1)(C). Third, parents or guardians who are dissatisfied with the educational program offered may request an impartial due process hearing to be conducted by a State administrative hearing officer. § 1415(b)(2) and (c). Fourth, a party who is dissatisfied with the decision issued by the State administrative hearing officer may seek judicial review of the

State administrative hearing officer's decision by filing a civil action in federal district court or in a State court of competent jurisdiction. § 1415(e)(2).

Section 1415(e)(2) governs the Court's review of decisions of administrative hearing officers, and provides, "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2). The Court evaluates Defendants' Renewed Motion for Final Judgment and Relief on *De Novo* Review in accordance with this standard.

B. Factual Background

The Court has reviewed the administrative record and the additional evidence that Plaintiffs submitted. The following statement of facts represents the Court's findings of fact based on a preponderance of the evidence.

1. Jensine's Educational History With the Walker County School District ("WCSD")

Defendant Jensine Bennett ("Jensine") is a ten-year-old student whose parents, Defendants John and Denise Bennett ("Defendants"), reside in Walker County, Georgia.[2] (Admin. Hr'g Tr. at 121-22; Resp'ts' Docs. at 0001.)[3] Jensine suffers

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[2] Jensine's birth date is September 15, 1988. (Admin. Hr'g Tr. at 122.) Jensine was eight years old when Plaintiffs filed this lawsuit.

[3] The administrative record consists of documents submitted by the parties as well as the transcript of the administrative hearing. The administrative record refers to documents submitted by Plaintiffs as Respondents' Documents and refers to documents filed by Defendants as Petitioners' Exhibits. When providing citations to documents contained in the administrative record, the Court also refers to documents submitted by Plaintiffs as Respondents' Documents and refers to documents filed by Defendants as Petitioners' Exhibits.

from autism. (Admin. Hr'g Tr. at 125; Resp'ts' Docs. at 0067.) Autism is a "developmental disability, generally evident before age three, that adversely affects a student's educational performance and significantly affects developmental rates and sequences, verbal and non-verbal communication and social interaction and participation." (Ga. Comp. Rules and Regs. § 160-4-7-.08; *see also* Admin. Hr'g Tr. at 297 (describing characteristics of autism).) A neurologist first concluded that Jensine exhibited "autistic-like behaviors" when Jensine was three years old. (Admin. Hr'g Tr. at 125; R-0018-0019; Pet'rs' Exs. 32 & 33.)

In October 1991, Plaintiff Walker County School District ("WCSD") conducted a pre-placement evaluation of Jensine. (R-0030-0052.) As a result of this evaluation, WCSD determined that Jensine was eligible to receive special education services pursuant to the IDEA. (R-0051-0052; Pet'rs' Ex. 18.) WCSD prepared an IEP for Jensine for the 1991-1992 school year that provided Jensine with preschool special education services. (R-0053-0059.) Jensine enrolled as a student in the WCSD pursuant to the terms of the 1991-1992 IEP. (Admin. Hr'g Tr. at 126, 128.)

During the 1992-1993 and 1993-1994 school years, Jensine remained enrolled as a preschool student in the WCSD. (Admin. Hr'g Tr. at 128, 130-31.) During both of these school years, Jensine received special education services as directed by her IEPs. (*Id.*)

During the 1994-1995 school year, Jensine attended a kindergarten class at the Rock Springs Elementary School within the WCSD. (Admin. Hr'g Tr. at 23, 134.) Jensine's teacher, Ms. Debbie Morgan, had never taught a child diagnosed with autism, and had limited experience with children who exhibited behaviors and limitations typical of autistic children. (Admin. Hr'g Tr. at 24-26.)

During the 1994-1995 school year, Jensine frequently engaged in self-stimulatory behavior while at school. (Admnin. Hr'g Tr. at 137.) Jensine also engaged in self-abusive behavior. (Admin. Hr'g Tr. at 46-48, 51-52, 139-45, 193-94, 261-62, 384-85, 387-88, 392, 403-06, 408; Resp'ts' Docs. at 0226-0228; Pet'rs' Ex. 42.) For example, Jensine banged her head against walls or window sills, or slapped her head with one or both of her hands. (Admin. Hr'g Tr. at 46-48, 51-52, 139-45, 193-94, 261-62, 384-85, 387-88, 392, 403-06, 408; Resp'ts' Docs. at 0226-0228; Pet'rs' Ex. 42.) Jensine also threw tantrums and alternated from crying hysterically to laughing. (Admin. Hr'g Tr. at 46-48, 51-52, 139-45, 193-94, 261-62, 384-85, 387-88, 392).

Ms. Morgan sought help from WCSD personnel and outside consultants to address Jensine's anger spells. (Admin. Hr'g Tr. at 49-50.) In response to Jensine's anger spells, Ms. Morgan and the classroom paraprofessional attempted to redirect Jensine's behavior, prevent the self-abusive behavior, and decrease verbal interchanges at the time of the anger spells and self-abusive behavior. (Admin. Hr'g Tr. at 50-51.) WCSD personnel did not convene another IEP meeting for Jensine to address the self-injurious behaviors. (Admin. Hr'g Tr. at 49, 52.)

During the 1994-1995 school year, Jensine had difficulty focusing on classroom tasks. (Admin. Hr'g Tr. at 54, 61.) Jensine, however, could accomplish her classroom tasks if Ms. Morgan or the classroom paraprofessional stayed by Jensine's side and assisted her until she completed the tasks. (*Id.*) Ms. Morgan and the classroom paraprofessional, however, often could not provide this one-on-one assistance to Jensine because they had to assist the other children in the classroom. (*Id.* at 400-02.)

During the spring of 1995, WCSD personnel prepared a proposed IEP for Jensine covering the 1995-1996 school year

("the proposed 1995-1996 IEP"). (Resp'ts' Docs. at 0328-0355.) On June 12, 1995, WCSD personnel and Defendants met to discuss the proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 146-47; Resp'ts' Docs. at 0328-0335.)

During the June 12, 1995, meeting, Defendants refused to sign the proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 74-75; R-0355.) Defendants believed that Plaintiff WCSD should have provided Jensine with extended school year services. (Admin. Hr'g Tr. at 146-48; Resp'ts' Docs. at 0334.) Specifically, Defendants requested that the WCSD provide for Jensine's enrollment in a summer program at the Orange Grove Center, a private institution in Chattanooga, Tennessee that educates only handicapped children. (Admin. Hr'g Tr. at 75, 146-48; Resp'ts' Docs. at 0334.) Defendants also believed that Jensine should receive additional speech and language therapy, and that Defendant Denise Bennett should participate in the speech therapy sessions. (Resp'ts' Docs. at 0333.) Finally, Defendants believed that the WCSD should provide Jensine with occupational therapy services. (Resp'ts' Docs. at 0333.)

After the June 12, 1995, IEP meeting, Defendants met with Truman Atkins, who served as Superintendent of the WCSD. (Admin. Hr'g Tr. at 148; Resp'ts' Docs. at 0359.) During this meeting, Defendants informed Mr. Atkins that they believed the WCSD should provide for Jensine's enrollment in the Orange Grove Center's summer program. (Admin. Hr'g Tr. at 148.) Mr. Atkins rejected this request. (Admin. Hr'g Tr. at 184; Resp'ts' Docs. at 0359.)

After Mr. Atkins' meeting with Defendants, WCSD offered to provide Jensine with a five-week summer program at the Rock Springs Elementary School with Ms. Morgan. (Admin. Hr'g Tr. at 149, 184; Resp'ts' Docs. at 0359.) The summer program would have provided Jensine with three hours of instruction per school day. (Admin. Hr'g Tr. at 149,

184; Resp'ts' Docs. at 0359.) Defendants rejected this offer because Defendants believed that the length of the school days was insufficient. (Admin. Hr'g Tr. at 185.)

After Mr. Atkins' meeting with Defendants, WCSD also offered to send Ms. Morgan and Ms. Snelsen, Jensine's speech therapist, to the Orange Grove Center for a TEACCH training seminar.[4] (Resp'ts' Docs. at 0359.) In August 1995, WCSD sent Ms. Morgan and Ms. Snelsen to the Orange Grove Center for one week to receive training in the TEACCH method. (Admin. Hr'g Tr. at 76.) After attending TEACCH training, Ms. Morgan implemented some of the changes recommended by the TEACCH program in her classroom. (Admin. Hr'g Tr. at 77.) Ms. Morgan and Ms. Snelsen, however, did not receive on-going supervision or follow-up training in the TEACCH method. (Admin. Hr'g Tr. at 77.)

On August 18, 1995, WCSD held a second IEP meeting concerning Jensine's proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 150; Resp'ts' Docs. at 0365-0369.) The proposed 1995-1996 IEP provided that Jensine would receive four hours per week of speech and language therapy. (Resp'ts' Docs. at 0338.) The proposed 1995-1996 IEP also stated that Jensine would spend two hours and forty minutes per week in regular education classes, including thirty minutes of library time with a kindergarten class, thirty minutes of physical education with a kindergarten class, and twenty minutes per day in a kindergarten class for pre-academics. (*Id.*) The proposed IEP also provided that WCSD would evaluate Jensine to determine whether it would offer occupational therapy services to Jensine. (Admin. Hr'g Tr. at 150.) The proposed

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[4] TEACCH is an acronym for Treatment and Education of Autistic and Related Communications Handicapped Children. (Admin. Hr'g Tr. at 272.) The TEACCH method is especially useful for educating autistic children. (*Id.*)

IEP did not contain a detailed behavior management plan to address Jensine's self-injurious behavior, but instead proposed to address this behavior by employing "behavior modification strategies," including a "time-out" strategy. (Resp'ts' Docs. at 0338, 0352.)

During the August 18, 1995, meeting, Defendants rejected the proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 75-76; Resp'ts' Docs. at 0367.) Defendants believed that the proposed 1995-1996 IEP was inadequate because it did not provide Jensine with occupational therapy services and it did not contain a detailed behavior management plan in response to Jensine's self-abusive behavior. (Admin. Hr'g Tr. at 150-51; Resp'ts' Docs. at 0365-0369.)

During the August 18, 1995, IEP meeting, Defendants informed WCSD personnel that Defendants intended to remove Jensine from the WCSD and enroll her in the Orange Grove Center. (Admin. Hr'g Tr. at 76, 158; Resp'ts' Docs. at 0365, R-0367.) Defendants also informed WCSD personnel that Defendants intended to seek reimbursement for Jensine's placement in the Orange Grove Center from the WCSD. (Resp'ts' Docs. at 0364-0365, 0367.)

After the August 18, 1995, IEP meeting, Defendants unilaterally removed Jensine from the WCSD and enrolled her in the Orange Grove Center. (Admin. Hr'g Tr. at 153.) The Orange Grove Center provided Jensine with the following services: (1) speech and language therapy; (2) occupational therapy; (3) a behavior management program; and (4) one-on-one instruction using the TEACCH method. (Admin. Hr'g Tr. at 190, 197-98, 211, 222-24, 239, 243-44.)

Defendants incurred tuition costs of $62.65 per day for enrolling Jensine in the Orange Grove Center. (Admin. Hr'g Tr. at 164.) The Orange Grove Center is nineteen miles from Defendants' home. (*Id.* at 157.) Defendants apparently made the trip to the Orange Grove Center twice each day. (Compl. Corrected Ex. A.)

In July 1996, Defendants requested a due process hearing to contest the validity of the WCSD's proposed 1995-1996 IEP. Defendants also challenged Jensine's future proposed placement within the WCSD. (Admin. Hr'g Tr. at 21.)

In August 1996, WCSD offered to convene an IEP meeting to prepare an IEP for Jensine for the 1996-1997 school year. (Resp'ts' Docs. at 0376-0377.) Defendants declined this offer. (*Id.*) Defendants also refused to permit Plaintiffs to evaluate Jensine or to obtain Jensine's records from the Orange Grove Center to prepare the proposed 1996-1997 IEP. (*Id.*) Plaintiffs did not develop a proposed IEP for Jensine for the 1996-1997 school year.

2. Professional Recommendations and Expert Testimony

   a. Recommendations and Evaluations Obtained By Defendants

Defendants have obtained several professional evaluations with respect to Jensine's condition and education. On June 19, 1991, Anna Davenport, a speech and language pathologist from Erlanger Medical Center, evaluated Jensine. (Resp'ts' Docs. at 0011-0013; Pet'rs' Ex. 41; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).) Ms. Davenport noted that Jensine exhibited severe receptive and expressive language delays, as well as a behavior disorder. (Resp'ts' Docs. at 0013; Pet'rs' Ex. 41; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).) Ms. Davenport recommended that Jensine receive therapy two times per week to focus on developing compliant behavior and improving receptive and expressive language skills. (Resp'ts' Docs. at 0013; Pet'rs' Ex. 41; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).)

On August 1, 1991, and August 7, 1991, Dr. William M. Hillner conducted a psychological evaluation of Jensine. (Resp'ts' Docs. at 0016-0020; Pet'rs' Ex. 16 (Orange Grove Ctr. Docs.).) Dr. Hillner noted that Jensine had "autistic-

like" behaviors and avoidant behavior. (Resp'ts' Docs. At 0018 ; Pet'rs' Ex. 16 (Orange Grove Ctr. Docs.).)

On August 22, 1991, Dr. David L. Neall evaluated Jensine and concluded that Jensine had speech and language delays. (Resp'ts' Docs. at 0021; Pet'rs' Ex. 22.) Dr. Neall noted that Jensine required the services of a speech and language therapist. (Resp'ts' Docs. at 0021; Pet'rs' Ex. 22.)

On December 3, 1991, Dr. Dwain Blackston of the Emory Autism Resource Center at Emory University evaluated Jensine. (Resp'ts' Docs. at 0063—0064; Pet'rs Ex. 17; Pet'rs Ex. 10 (Orange Grove Ctr. Docs.).) Dr. Blackston noted that it was "critical" for Jensine to be in a "structured preschool setting with behavioral contingencies." (Resp'ts' Docs. at 0064; Pet'rs' Ex. 17; Pet'rs' Ex. 10 (Orange Grove Ctr. Docs.).)

In December 1991, Dr. Lawrence T. Chien evaluated Jensine and concluded that Jensine had "infant autism." (Resp'ts' Docs. at 0067; Pet'rs' Ex. 32; Pet'rs' Ex. 10 (Orange Grove Ctr. Docs.).) Dr. Chien believed that Jensine needed six hours of school per day, along with speech therapy and behavior modification services. (Resp'ts' Docs. at 0070; Pet'rs' Ex. 32; Pet'rs' Ex. 10 (Orange Grove Ctr. Docs.).)

On August 31, 1993, the Emory Autism Resource Center at Emory University evaluated Jensine. (Resp'ts' Docs. at 0170; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals at the Emory Autism Resource Center concluded that Jensine functioned at the level of a twenty-month-old child. (Resp'ts' Docs. at 0173; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals also concluded that Jensine suffered from autistic disorders and general developmental delays. (Resp'ts' Docs. at 0176; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals recommended that Jensine receive an educational treatment program for thirty hours per week.

(Resp'ts' Docs. at 0176; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals noted that a full-day, twelve-month program was "ideal" for Jensine. (Resp'ts' Docs. at 0176; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals also recommended that a specialist with expertise in autism assist in designing Jensine's education and treatment programs. (Resp'ts' Docs. at 0177; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) The professionals also noted that Jensine's teachers should receive on-going training, supervision, and support. (Resp'ts' Docs. at 0177; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) Finally, the professionals recommended that Jensine receive a minimum of three sessions per week of speech and language pathology, and that Defendants become involved in Jensine's speech and language therapy. (Resp'ts' Docs. at 0177; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).)

During the 1995-1996 school year, Defendants employed a psychologist, Dr. Ronald Wigley, to observe Jensine in Ms. Morgan's classroom and make recommendations. (Admin. Hr'g Tr. at 79-83, 104; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) Dr. Wigley noted that Jensine would benefit from one-on-one instruction and additional speech and language instruction. (Admin. Hr'g Tr. at 86, 108; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) Dr. Wigley recommended that Jensine attend a summer or extended school year program during the summer of 1995. (Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) Dr. Wigley recommended the summer program provided by the Orange Grove Center during the summer of 1995. (Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr.

Docs.).)[5] Dr. Wigley recommended that Jensine attend an extensive summer program because he believed that Jensine had reached a critical point in the development of her language skills. (Admin. Hr'g Tr. at 84-85, 87, 112-13; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).)

Dr. Wigley also recommended that WCSD consider using the TEACCH program approach, as used by the Orange Grove Center, to educate Jensine. (Admin. Hr'g Tr. at 84, 86-87, 900, 105; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) Dr. Wigley further recommended that WCSD consider sending Jensine's teachers to the Orange Grove Center to receive training in the TEACCH method. (Admin. Hr'g Tr. at 84, 90, 105, 107-08; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).)

b. Evaluations and Recommendations Obtained by the WCSD

During Jensine's enrollment in the WCSD and in preparation for this case, Plaintiffs invited several professsionals to evaluate Jensine's educational placement. On April 23, 1992, personnel from the Georgia Center for the Multi-Handicapped concluded that Jensine suffered from autism as well as a developmental speech and language disorder. (Resp'ts' Docs. at 0070-0083; Pet'rs' Ex. 28) Dr. Mridula Puri, a psychiatrist who examined Jensine at the request of personnel from the Georgia Center for the Multi-Handicapped, recommended that Jensine receive occupational therapy. (Pet'rs' Ex. 28.)

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[5] Dr. Wigley, however, did not recommend that Jensine attend the Orange Grove Center after the summer of 1995. (Admin. Hr'g Tr. at 87-88.)

On May 5, 1992, Judi Bailey, an employee of the Orange Grove Center, issued a report summarizing her evaluation of Jensine and her classroom at the WCSD. (Resp'ts' Docs. at 0099-0107; Pet'rs' Exs. 1 & 27; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) Ms. Bailey concluded that Jensine functioned at the level of a fifteen to twenty-four month-old child. (Resp'ts' Docs. at 0100; Pet'rs' Exs. 1 & 27; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) Ms. Bailey noted that Jensine would require a highly structured, consistent, and predictable environment for learning. (Resp'ts' Docs. at 0100; Pet'rs' Ex. 1 & 27; Pet'rs' Exs. 21 (Orange Grove Ctr. Docs.).)

On December 3, 1992, Glenda Evans, a speech and language pathologist, observed Jensine in her classroom at the WCSD. (Resp'ts' Docs. at 0131; Pet'rs' Ex. 38; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).) Ms. Evans issued a report recommending that Jensine receive two thirty-minute sessions of speech and language therapy per week. (Resp'ts' Docs. at 0134; Pet'rs' Ex. 38; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).)

On January 10, 1995, Dana Driggers, a staff member of the Georgia Project for Assistive Technology, observed Jensine in Ms. Morgan's classroom. (Resp'ts' Docs. at 0216; Pet'rs' Ex. 10; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).) Ms. Driggers issued a report summarizing her observations and recommendations. (Resp'ts' Docs. at 0216; Pet'rs' Ex. 10; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).) Ms. Driggers recommended that Ms. Morgan: (1) obtain a communication aid for Jensine that could supplement her educational skills; (2) use photographs and line drawings to help Jensine communicate; (3) require Jensine to select photographs and line drawings; (4) arrange Jensine's vocabulary by activity; (5) teach Jensine to use a generalized "want" response; (6) provide a classroom picture schedule to Jensine; and (7) give Jensine many opportunities throughout the day to make

choices. (Resp'ts' Docs. at 0217-0218; Pet'rs' Ex. 10; Pet'rs' Ex. 20 (Orange Grove Ctr. Docs.).)

On April 17, 1995, Beth Artress, a psychometrist, evaluated Jensine. (Resp'ts' Docs. at 0291.) Ms. Artress noted that Jensine needed increased language stimulation and required continued speech and language therapy. (Resp'ts' Docs. at 0291-0296.)

After receiving notice that Defendants had requested a due process hearing, Plaintiffs hired Dr. Lee Marcus to observe Jensine and evaluate the IEP that Plaintiffs proposed for Jensine for the 1995-1996 school year. Dr. Lee Marcus is a professor in the University of North Carolina School of Medicine Department of Psychiatry. (Admin. Hr'g Tr. at 270.) Dr. Marcus directs and participates in the University of North Carolina's TEACCH program. (*Id.* at 271, 273-74.) The University of North Carolina's TEACCH program offers training to teachers of autistic and handicapped children. (*Id.* at 276.)

On October 22, 1996, Dr. Marcus observed Jensine in her classroom at the Orange Grove Center. (Admin. Hr'g Tr. at 285-88; R-0371.) Dr. Marcus administered several tests to Jensine, including the Psycho-Educational Profile ("PEP"), and the Childhood Autism Rating Scale ("CARS"). (Admin. Hr'g Tr. at 290-300; Resp'ts' Docs. at 0373-0374.) Jensine's PEP results indicated that Jensine functioned at an age equivalent of one year and eight months. (Admin. Hr'g Tr. at 304; Resp'ts' Docs. at 0373.) Jensine's CARS results indicated that Jensine's autism was severe. (Admin. Hr'g Tr. at 302; Resp'ts' Docs. at 0373.) Dr. Marcus noted that Jensine's overall score on the PEP had changed very little over a three-year period, indicating that Jensine had made relatively little developmental progress as measured by the PEP. (Admin. Hr'g Tr. at 303-06; Resp'ts' Docs. at 0374.)

Dr. Marcus also evaluated Ms. Morgan's classroom at the Rock Springs Elementary School during the 1996-1997

school year. (Admin. Hr'g Tr. at 308.) Dr. Marcus believed that Ms. Morgan "could do a very competent job" educating students with autism. (*Id.* at 309.) Dr. Marcus also believed that Ms. Morgan's classroom had "good potential" to serve a child like Jensine. (*Id.* at 309, 373.) Dr. Marcus noted, however, that Ms. Morgan's classroom could benefit from changes, including adding a second assistant teacher if Jensine returned to Ms. Morgan's classroom. (*Id.* at 373.) Dr. Marcus noted that adding a second assistant teacher would facilitate increased one-on-one instruction. (*Id.* at 373.)

Dr. Marcus opined that it "did not seem necessary" for Jensine to be in an educational setting like the Orange Grove Center. (Admin. Hr'g Tr. at 314.) Dr. Marcus believed that Jensine's disability was not so severe that Jensine could not receive an education in the regular school setting. (*Id.* at 316.) Dr. Marcus also believed that exposure to typical peers in the school system was important for Jensine's education. (*Id.* at 315.) Dr. Marcus also noted that community-based instruction in the environment where Jensine will be living is important, and that the WCSD offered these experiences to Jensine. (*Id.* at 319-21.)

Dr. Marcus also evaluated the IEP that Plaintiffs proposed for Jensine for the 1995-1996 school year. (Admin. Hr'g Tr. at 375; Resp'ts' Docs. at 0375.) Dr. Marcus believed that the proposed IEP was reasonably calculated to provide Jensine with educational benefit. (Admin. Hr'g Tr. at 375; Resp'ts' Docs. at 0375.) Although Dr. Marcus noted that Jensine could benefit from occupational therapy, he also testified that occupational therapy was not an essential component of Jensine's IEP. (Admin. Hr'g Tr. at 323.) Dr. Marcus stated, however, that if Jensine's self-injurious behavior occurred on a daily basis as reported by Defendants, a behavior management plan "might have been indicated" for the 1996-1997 school year. (*Id.* at 347-49.) Dr. Marcus also stated that "time-out" was not a behavior management strategy that he

would recommend for a child like Jensine. (*Id* at 349.) Dr. Marcus further testified that, if Jensine was the type of child who required the development of a behavior management plan, Dr. Marcus would recommend that the WCSD involve a psychologist who understood autism in constructing that plan. (*Id.* at 350.)

3. State Administrative Law Judge's Decision

On December 9 and 10, 1996, a State administrative law judge ("ALJ") held a due process hearing in response to Defendants' hearing request. On February 10, 1997, the ALJ issued a decision. (Compl. Corrected Ex. A.)

The ALJ concluded that Plaintiffs failed to provide Jensine with an appropriate, free public education for the 1995-1996 school year. (Compl. Corrected Ex. A at 12, 21-22.) In reaching this decision, the ALJ rejected Plaintiffs' claim that Defendants could not obtain reimbursement for the costs of Jensine's placement at the Orange Grove Center for the 1995-1996 school year because Defendants failed to make a timely request for a due process hearing. (*Id.* at 12.) The ALJ compared Jensine's progress while enrolled in the WCSD to Jensine's progress while enrolled in the Orange Grove Center in determining that Plaintiffs failed to provide Jensine with a free, appropriate public education. (*Id.* at 18-19, 21.) The ALJ noted that Jensine began engaging in self-injurious behavior during the 1994-1995 school year, and that the behavior had "almost disappeared completely since the use of communication pictures and occupational therapy were implemented at Orange Grove." (*Id.* at 20-21.) The ALJ also found that Plaintiffs had failed to provide Jensine with behavior management, occupational therapy, full twelve-month educational services, and communication aids. (*Id.* at 20.)

The ALJ also concluded that the Orange Grove Center was an appropriate placement for Jensine. (Compl. Corrected Ex. A at 21-22.) In reaching this conclusion, the ALJ found that

the Orange Grove Center was the least restrictive environment for Jensine for the 1995-1996 school year. (*Id.* at 22.) The ALJ acknowledged that the Orange Grove Center is an institution that serves disabled persons, and that Jensine's opportunities to interact with non-disabled peers were limited at the Orange Grove Center. (*Id.*) The ALJ found, however, that Jensine's need for the Orange Grove Center's services currently outweighed her need to interact in the school environment with non-disabled peers. (*Id.*). The ALJ also noted that Jensine was not a residential student at the Orange Grove Center, and that she had opportunities to interact with her sister and other non-disabled friends after school and on weekends. (*Id.*)

Accordingly, the ALJ ordered Plaintiffs to reimburse Defendants for the tuition costs associated with Jensine's education at the Orange Grove Center during the 1995-1996 school year. (Compl. Corrected Ex. A at 22-24.) The ALJ also ordered Plaintiffs to reimburse Defendants for the mileage costs associated with traveling to and from Defendants' home and the Orange Grove Center. (*Id.*)

The ALJ declined to award Defendants the costs associated with Jensine's education at the Orange Grove Center during the 1996-1997 school year. (Compl. Corrected Ex. A at 23.) The ALJ reasoned that, because WCSD and Defendants had not completed an IEP for Jensine covering the 1996-1997 school year, he could not evaluate the services that WCSD would have offered to Jensine during that year. (*Id.* at 23.)

C. Procedural Background

On March 12, 1997, Plaintiffs filed this lawsuit. Plaintiffs appeal from the ALJ's decision awarding reimbursement to Defendants for the costs associated with Jensine's education during the 1995-1996 school year. (Compl. ¶¶ 26-31.) Defendants assert a Cross-Complaint against Plaintiffs, alleging that the ALJ erred by refusing to award reimbursement to Defendants for the costs associated with

Jensine's education at the Orange Grove Center during the 1996-1997 school year. (Answer and Cross-Compl. ¶ 41.)

On July 7, 1997, Plaintiffs filed a Motion to Submit Additional Evidence. On July 8, 1997, Plaintiffs filed a Motion for Summary Judgment as to Defendants' Cross-Complaint. On August 15, 1997, Defendants filed their initial Motion for Final Judgment and Relief on *De Novo* Review.

On January 29, 1998, the Court issued an Order denying Plaintiffs' Motion to Submit Additional Evidence as premature because Plaintiffs had failed to specify the additional evidence that Plaintiffs wished the Court to consider. (Order of Jan. 29, 1998, at 15.) The Court also denied Plaintiffs' Motion for Summary Judgment as to Defendants' Cross-Complaint. (*Id.* at 20-28.) The Court denied Defendants' initial Motion for Final Judgment and Relief on *De Novo* Review as premature. (*Id.* at 28-29.)

On June 15, 1998, Plaintiffs filed a Second Motion to Submit Additional Evidence. On July 20, 1998, Defendants filed their Renewed Motion for Final Judgment and Relief on *De Novo* Review.

On July 28, 1998, the Court denied Plaintiffs' Second Motion to Submit Additional Evidence, with the exception of the deposition of Ms. Leeann Shelton. (Order of July 29, 1998, at 1-26.) On September 24, 1998, the Court denied Plaintiffs' Motion for Reconsideration of the July 28, 1998, Order. (Order of Sept. 24, 1998.) The Court, however, granted Plaintiffs' request for permission to file an application for an interlocutory appeal of the July 28, 1998, Order with the United States Court of Appeals for the Eleventh Circuit. (*Id.*) The Eleventh Circuit subsequently denied Plaintiffs' application for interlocutory appeal and returned the case to this Court.

On January 13, 1999, the Court held a status conference with respect to this case. During the January 13, 1999, status

conference, the Court granted Plaintiffs' request for oral argument on Defendants' Renewed Motion for Final Judgment and Relief on *De Novo* Review. The Court also permitted Plaintiffs to specify additional documents concerning Jensine's enrollment at the Orange Grove Center for the Court's consideration.

On February 9, 1999, the Court entered an Order permitting Plaintiffs to introduce additional documents concerning Jensine's enrollment at the Orange Grove Center. (Order of Feb. 9, 1999.) On February 10, 1999, the Court held oral arguments concerning Defendants' Renewed Motion for Final Judgment and Relief on *De Novo* Review. Defendants' Motion therefore is ripe for resolution by the Court.

II. Discussion

A. Appropriate Method of Proceeding: Summary Judgment or Appeal from Administrative Decision

Plaintiffs argue that the Court cannot properly consider Defendants' Motion as a Motion for Final Judgment, because Plaintiffs have submitted evidence in addition to the administrative record for the Court's consideration. Plaintiffs claim that, because the Court has agreed to consider additional evidence, Defendants' Motion for Final Judgment and Relief on *De Novo* Review actually is a Motion for Summary Judgment. Plaintiffs argue that the Court could not grant summary judgment in Defendants' favor in this case, however, because genuine factual disputes remain.[6] Plaintiffs therefore propose that the Court conduct a limited trial in this case.

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[6] The Court also could not grant Defendants' Motion if the Court interpreted the Motion as a summary judgment motion because the Motion does not include the Statement of Material Facts required by the Local Rules. Defendants' Motion therefore is procedurally improper. *See* L.R.N.D. Ga. 56.1 (setting forth requirements for filing motion for summary judgment).

The judicial review provision of the IDEA states, "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2). The Eleventh Circuit has not determined how a district court should proceed in an IDEA case involving a Motion for Final Judgment when the district court considers evidence in addition to the administrative record.

The Ninth Circuit, however, addressed a similar situation in *Capistrano Unified School District v. Wartenburg*, 59 F.3d 884 (9th Cir. 1995). The Ninth Circuit explained, "[o]rdinarily one expects review of an administrative decision to be limited to the record before the administrative body, and for the court to be required to affirm if substantial evidence on the whole record supports the administrative determination." 59 F.3d at 891 (citing *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993)). The court noted that summary judgment ordinarily could not issue in an IDEA case, because genuine disputes usually existed. *Id.* The court stated, however, that "if the district court tried the case anew, the work of the hearing officer would not receive 'due weight,' and would be largely wasted." *Id.* The court further provided: "It is hard to see what else the district court could do as a practical matter under the statute except read the administrative record, consider the new evidence, and make an independent judgment based on the preponderance of evidence and giving due weight to the hearing officer's determination." *Id.* at 892. The court concluded:

> Because this appears to be what Congress intended under the Act, we conclude that it is the right thing to do, even though it does not fit well into any pigeonhole of the Federal Rules of Civil Procedure. Though the parties may call the procedure a "motion for summary judg-

> ment" in order to obtain a calendar date from the district court's case management clerk, the procedure is in substance an appeal from an administrative determination, not a summary judgment.

Id. The court therefore treated the parties' motions as an appeal from an administrative determination, even though the parties had captioned the motions as motions for summary judgment. *Id.*

The Court finds that the Ninth Circuit's approach is the appropriate method for proceeding in this case. Defendants' Motion for Final Judgment and Relief on *De Novo* Review essentially requests the Court to review the administrative record, review the additional evidence Plaintiffs submitted, and determine whether the administrative hearing officer's decision was correct. Defendants' Motion therefore involves an appeal from an administrative decision. Accordingly, the Court will treat Defendants' Motion as an appeal from an administrative determination. The Court will review the administrative record and the additional evidence, and will render a decision on the parties' appeal from an administrative decision based on a preponderance of the evidence.[7]

B. Approach for Reviewing an IDEA Administrative Decision

Under Eleventh Circuit law, a court examining a State administrative law judge's decision under the IDEA must

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[7] The Court also notes that, under the facts of this case, treating Defendants' Motion as a summary judgment motion would be inefficient. The Court already has determined what additional evidence it will consider, and has concluded that it will not hear live testimony. The record therefore is complete. Denying Defendants' Motion and then rendering a separate decision on the administrative appeal would serve no purpose except to delay the resolution of this case.

apply the following approach. The court first must inquire whether the State or local education agency has complied with the procedures set forth in the IDEA. *Todd D. v. Andrews*, 933 F.2d 1576, 1579 (11th Cir. 1991) (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)); *see also Weiss v. School Bd.*, 141 F. 3d 990, 996 (11th Cir. 1998) (same).[8] The court next must determine whether the IEP developed pursuant to the IDEA is "reasonably calculated to enable the child to receive educational benefits." *Todd D.*, 933 F.2d at 1579 (quoting *Rowley*, 458 U.S. at 206-07); *see also Weiss*, 141 F.3d at 996 (same). The court must base its decision on the preponderance of the evidence. § 1415(e)(2). The party challenging the outcome of the state administrative law judge's decision bears the burden of proof. *Board of Educ. v. Illinois State Bd. of Educ.*, No. 98 C 2973, 1998 WL 792479, at *5 (N.D. Ill. Nov. 9, 1998); *Morton Community Unit Sch. Dist. v. J.M.*, 986 F. Supp. 1112, 1116 (C.D. Ill. 1997), *aff'd*, 152 F.3d 583 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3347 (U.S. Oct. 22, 1998) (No. 98-764).

The Court must conduct a *de novo* review of the state administrative law judge's findings. *Chris C. v. Gwinnett County Sch. Dist.*, 780 F. Supp. 804, 812 (N.D. Ga. 1991), *aff'd*, 968 F.2d 25 (11th Cir. 1992). The court also must give the findings of the state administrative law judge " 'due weight.' " *Myles S. v. Montgomery County Bd. of Educ.*, 824 F. Supp. 1549, 1553 (M.D. Ala. 1993). The court, however, is "free to accept or reject" the administrative law judge's findings of fact. *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988).

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[8] If the State or local education agency has not complied with all of the IDEA's procedures, the parents or persons challenging the IEP must show that harm occurred to the child as a result of the procedural violations. *Weiss v. School Bd.*, 141 F.3d 990, 996 (11th Cir. 1998). "Violation of any of the procedures of the IDEA is not a per se violation of the Act." *Id.*

"[W]hen measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity." *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) (citing *Todd D.*, 933 F.2d at 1580). The basic floor of opportunity " 'consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.' " *Todd D.*, 933 F. 2d at 1581 (quoting *Rowley*, 458 U.S. at 201). "The IEP and the IEP's educational outcome need not maximize the child's education." *JSK*, 941 F.2d at 1573. "If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied." *Id.* "While a trifle might not represent 'adequate' benefits, . . . maximum improvement is never required." *Id.* (citation omitted). "Adequacy must be determined on a case-by-case basis in the light of the child's individual needs." *Id.* When determining whether an IEP is adequate, the Court "must pay great deference to the educators who develop the IEP." *Todd D.*, 933 F.2d at 1580.

C. Defendants' Claims for the 1994-1995 School Year

Plaintiffs argue that, to the extent that Defendants assert claims concerning Jensine's IEP and placement during the 1994-1995 school year, Defendants have failed to exhaust their administrative remedies. Specifically, Plaintiffs note that Defendants did not seek an administrative hearing with respect to the 1994-1995 school year and did not litigate the appropriateness of the 1994-1995 IEP or their request for compensatory education before the state administrative hearing officer.

The IDEA establishes a procedural framework to allow parents to obtain administrative and judicial review of decisions that the parents deem inappropriate or unsatisfactory. The IDEA first allows parents to bring a complaint

on matters "relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." § 1415(b)(1)(E). After bringing a complaint, parents may seek an impartial due process hearing conducted by the State or local educational agency. § 1415(b)(2). The IDEA next permits any party who is dissatisfied with the findings and decisions entered in the due process hearing to obtain additional administrative review by appealing to the State educational agency. § 1415(c). Finally, the IDEA allows any party who is dissatisfied with the findings and decisions made by the State educational agency during the additional administrative review process to contest those findings and decisions by filing suit in federal or State court. § 1415(e).

The IDEA thus requires plaintiffs to "'utilize the elaborate administrative scheme established by the [IDEA] before resorting to the courts to challenge the actions of the local school authorities.'" *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 769 (1997). The major reasons for requiring the exhaustion of administrative remedies are:

> (1) to permit the exercise of agency discretion and expertise on issues requiring these characteristics; (2) to allow the full development of technical issues and a factual record prior to court review; (3) to prevent deliberate disregard and circumvention of agency procedures established by Congress; and (4) to avoid unnecessary judicial decisions by giving the agency the first opportunity to correct any error.

Id. at 1378-79 (citing *Association for Retarded Citizens v. Teague*, 830 F.2d 158, 160 (11th Cir. 1987)).

The IDEA does not require parents to exhaust administrative remedies if resorting to administrative remedies would be futile or inadequate. *N.B.*, 84 F.3d at 1379.

Defendants do not argue that resorting to the administrative review process for the 1994-1995 school year would have been futile or inadequate. Defendants, however, did not exhaust their administrative remedies with respect to the 1994-1995 school year. Defendants therefore may not seek judicial review for their claims concerning the 1994-1995 school year. *See Doe v. Walker County Bd. of Educ.*, No. Civ. A. 4:95-CV-0219-HLM, 1997 WL 866983, at *5 (N.D. Ga. Sept. 19, 1997) (barring plaintiff's claim for subsequent school years because plaintiff failed to request a due process claim during those years or raise the issues relating to those years during the administrative hearing); *see also Urban v. Jefferson County Sch. Dist.*, 89 F.3d 720, 725 (10th Cir. 1996) (concluding that, even though plaintiff had exhausted administrative remedies for earlier year's IEP, plaintiff still must pursue administrative remedies for later year's IEP); *Essen v. Board of Educ.*, No. 92-CV-1164(FJS)(GJD), 1996 WL 191948, at *6 (N.D.N.Y. Apr. 15, 1996) (dismissing IDEA claim for 1992-93 school year where, although Plaintiffs had exhausted administrative remedies with respect to IEP for 1991-92 school year, Plaintiffs had not sought administrative review with respect to 1992-93 IEP); *Bruschini v. Board of Educ.*, 911 F. Supp. 104, 108 (S.D.N.Y. 1995) (dismissing IDEA claim for tuition reimbursement for future school year not asserted during administrative proceedings); *Pink v. Mt. Diablo Unified Sch. Dist.*, 738 F. Supp. 345, 347-48 (N.D. Cal. 1990) (dismissing portion of complaint seeking relief for future school years not reviewed in administrative proceedings). To the extent that Defendants seek compensatory education for the 1994-1995 school year, this claim also is barred because Defendants did not raise this issue in the administrative proceedings.

For the reasons discussed above, all of Defendants' claims relating to the 1994-1995 school year are barred. The Court

therefore denies Defendants' Motion for Final Judgment and Relief on *De Novo* Review with respect to these claims.

D. Defendants' Claims Concerning the 1995-1996 School Year

Plaintiffs argue that the ALJ erred by ordering Plaintiffs to reimburse Defendants for their costs of placing Jensine in the Orange Grove Center for the 1995-1996 school year because: (1) Defendants failed to file their request for a due process hearing in a timely fashion; (2) Defendants failed to afford Plaintiffs an opportunity to make the changes Defendants requested; and (3) Defendants cannot satisfy the requirements for obtaining reimbursement for the 1995-1996 school year. The Court considers these arguments in turn.

1. Whether Defendants Failed to File Their Request for a Due Process Hearing in a Timely Fashion

Plaintiffs first argue that Defendants failed to file their request for a due process hearing in a timely fashion. The ALJ rejected this argument when Plaintiffs raised it during the administrative proceedings. (Compl. Corrected Ex. A at 12).

On August 18, 1995, Defendants refused to sign the proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 76; Resp'ts' Docs. at 0367.) On that same day, Defendants also informed WCSD personnel that Defendants planned to enroll Jensine in the Orange Grove Center for the 1995-1996 school year, and that they intended to seek reimbursement from the WCSD for the costs of this placement. (Admin. Hr'g Tr. at 76, 158; Resp'ts' Docs. at 0364-0365, 0367.) Defendants, however, did not request a due process hearing until July 1996.

No court within the Eleventh Circuit has addressed the issue whether parents can obtain reimbursement for the costs of unilaterally placing their child in a private school when the parents fail to request a due process hearing or fail to

notify the former school system of their disagreement with its services in a timely fashion. Other courts, however, have refused to award reimbursement for private placement where parents have removed children from school systems unilaterally and have delayed seeking administratrive review. In *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3d Cir. 1994), the Third Circuit denied reimbursement to parents who placed their child in a private school because the parents did not request administrative review of the local school system's actions until over two years after withdrawing the child from the local school system. 42 F.3d at 157-59. Other courts also require parents to initiate administrative review in a timely fashion by requesting a due process hearing. *See Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 579 (8th Cir. 1998) ("The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem."); *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 472 (D.N.J. 1998) (requiring "initiation of review proceedings within a reasonable time of a unilateral decision to transfer a child to a private institution"); *James v. Upper Arlington Sch. Dist.*, 987 F. Supp. 1017, 1024 (S.D. Ohio 1997) (denying reimbursement where parents unilaterally placed child in private school without making either formal complaint about child's placement or initiating administrative review proceedings); *Phillips v. Board of Educ.*, 949 F. Supp. 1108, 1113-14 (S.D.N.Y. 1997) (upholding denial of reimbursement where, although parents complained about school system's treatment of child's education, parents failed to seek administrative review for three years); *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343, 348 (S.D. Ohio 1989) (denying reimbursement for tuition and school expenses where parents waited two years to complain about child's placement), *rev'd on other grounds*, 932 F. 2d 551 (6th Cir. 1991); *Garland*

Indep. Sch. Dist. v. Wilks, 657 F. Supp. 1163, 1168 (N.D. Tex. 1987) (denying request for reimbursement for placement in private school during periods prior to parents' request for hearing).

For two reasons, the Court concludes that the cases cited above are distinguishable from this case. First, unlike the parents in the cases cited above, Defendants waited less than a year after removing Jensine from the WCSD before requesting a due process hearing. *Cf. J.H.*, 42 F.3d at 158 (noting that delay of more than one year is unreasonable). The Court therefore does not believe that Defendants' delay in requesting a due process hearing was so lengthy that it should bar Defendants' claim for reimbursement for the 1995-1996 school year.

Second, unlike the parents in the cases cited above, Defendants also informed WCSD personnel during the August 18, 1995, IEP meeting that: (1) Defendants did not approve the proposed 1995-1996 IEP; (2) Defendants had enrolled Jensine in the Orange Grove Center; and (3) Defendants planned to seek reimbursement from Plaintiffs for the costs of placing Jensine in the Orange Grove Center. (Admin. Hr'g Tr. at 76, 158; Resp'ts' Docs. at 0364-0365, 0367.) In similar circumstances, one court did not bar a claim for reimbursement. *Ivan P. v. Westport Bd. of Educ.*, 865 F. Supp. 74, 81-82 (D. Conn. 1994), *aff'd*, 101 F.3d 686 (2d Cir. 1996). In *Ivan P.*, the court noted that the parents had communicated their dissatisfaction to the school system, and stated:

> The court reiterates its appreciation of the importance the IDEA places on compliance with its procedural safeguards, but it is nevertheless convinced that the plaintiffs' failure to request a due process hearing in so many words does not deprive [the child] of his right to a free and appropriate education under the IDEA. It is communication and cooperation between parents and

> school boards that the IDEA seeks to foster through its procedural mechanisms. The record in this case reflects significant efforts at communication between the plaintiffs and the [school system], such that it would [be] inequitable to deny the plaintiffs reimbursement because they did not expressly request a due process hearing in their letter rejecting the [school system's] proposed placement.

Id. at 81-82. Like the parents in *Ivan P.*, Defendants communicated to Plaintiffs their wishes with respect to Jensine's proposed 1995-1996 IEP. (Admin. Hr'g Tr. at 76-158; Resp'ts' Docs. at 0364-0365, 0367.) During the August 18, 1995, IEP meeting, Defendants also notified Plaintiffs that Defendants planned to seek reimbursement from the WCSD for Jensine's placement in the Orange Grove Center. (Admin. Hr'g Tr. at 76, 158; Resp'ts' Docs. at 0364-0365, 0367.) Defendants' actions therefore put Plaintiffs on notice in August 1995 that Defendants planned to challenge Jensine's proposed 1995-1996 IEP and to seek reimbursement for the costs of Jensine's education at the Orange Grove Center.

For the above reasons, the Court concludes that Defendants' delay in requesting a due process hearing does not bar Defendants' claims for reimbursement for the 1995-1996 school year. The Court therefore rejects Plaintiffs' first argument.

2. Whether Defendants Must Have Afforded Plaintiffs an Opportunity to Make the Changes Defendants Requested

Plaintiffs next argue that Defendants cannot obtain reimbursement for the costs of Jensine's education at the Orange Grove Center during the 1995-1996 school year because Defendants failed to afford Plaintiffs an opportunity to make the changes Defendants requested to the proposed

1995-1996 IEP. In support of their argument, Plaintiffs cite two cases from the Eighth Circuit, *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998), and *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988). These cases, however, are inapposite. In each of these cases, the parents removed their children from the school districts and placed them in private schools before the school districts received opportunities to develop IEPs in response to the parents' concerns. *Schoenfeld*, 138 F.3d at 382; *Evans*, 841 F.2d at 831-32.

Here, Plaintiffs developed a proposed IEP for Jensine for the 1995-1996 school year during the spring of 1995. (Resp'ts' Docs. at 0328-0355.) On June 12, 1995, Plaintiffs convened an IEP meeting for Jensine. (Admin. Hr'g Tr. at 146-47; Resp'ts' Docs. at 0328-0355.) During the June 12, 1995, meeting, Defendants John and Denise Bennett informed Plaintiffs of their concerns regarding Jensine's proposed placement for the 1995-1996 school year and requested that Plaintiffs provide certain services to Jensine. (Admin. Hr'g Tr. at 78, 146-48; Resp'ts' Docs. at 0333-0334.) Plaintiffs had an opportunity to change or refuse to change the proposed 1995-1996 IEP in response to Defendants' requests prior to the August 15, 1995, meeting. Plaintiffs' second argument thus is without merit.

3. Whether Defendants Satisfy the Requirements for Obtaining Reimbursement

Plaintiffs next argue that Defendants cannot satisfy the requirements for obtaining reimbursement. The Court may order Plaintiffs to reimburse Defendants for the costs Defendants incurred by unilaterally removing Jensine from the WCSD and placing Jensine in the Orange Grove Center only if: (1) the proposed 1995-1996 IEP failed to provide Jensine with a free, appropriate public education; and (2) the Orange Grove Center was an appropriate placement for

Jensine. *Drew P. v. Clarke County Sch. Dist.*, 676 F. Supp. 1559, 1570 (M.D. Ga. 1987), *aff'd*, 877 F.2d 927 (11th Cir. 1989). Under those circumstances, reimbursement is warranted because it " 'merely requires the [school system] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper [IEP].' " *Jenkins v. Florida*, 815 F.2d 629, 630 (11th Cir. 1987) (quoting *School Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370 (1985)). The Eleventh Circuit has noted that "[w]hether reimbursement is appropriate, and at what amount, should be determined by balancing the equities of the particular case." *Id.* at 631.

Plaintiffs argue that Defendants cannot satisfy the requirements for obtaining reimbursement because: (1) Plaintiffs provided Jensine with a free, appropriate public education; and (2) the Orange Grove Center was not an appropriate placement for Jensine.

a. Whether the Proposed 1995-1996 IEP Failed to Provide Jensine With a Free, Appropriate Public Education

Plaintiffs argue that Defendants cannot satisfy the first requirement for obtaining reimbursement because the proposed 1995-1996 IEP provided Jensine with a free, appropriate public education. As discussed *supra* Part II. B., a court reviewing a state administrative law judge's decision in an IDEA case first must inquire whether the educational agency has complied with the IDEA's procedural requirements. *Weiss*, 141 F.3d at 996; *Todd D.*, 933 F. 2d at 1576. Here, Defendants do not allege that Plaintiffs failed to comply with the IDEA's procedural requirements with respect to the 1995-1996 school year. The Court therefore concludes that Plaintiffs complied with the IDEA's procedural requirements.

The Court next must determine whether the IEP developed pursuant to the IDEA is "reasonably calculated to enable the

child to receive educational benefits." *Todd D.*, 933 F.2d at 1579. As discussed *supra* Part II.B., the Court must determine only whether the IEP that Plaintiffs proposed for Jensine for the 1995-1996 school year provided Jensine with "the basic floor of opportunity." *JSK*, 941 F.2d at 1573. The basic floor of opportunity includes " 'access to specialized instruction and related services which are individually designed to provide educational benefit.' " *Todd D.*, 933 F.2d at 1581 (quoting *Rowley*, 458 U.S. at 201). "The IEP and the IEP's educational outcome need not maximize the child's education." *JSK*, 941 F.2d at 1573. "If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied." *Id.* "Adequacy must be determined on a case-by-case basis in the light of the child's individual needs." *Id.*

As an initial matter, the Court finds that the ALJ erred by comparing Jensine's subsequent progress at the Orange Grove Center to her progress while enrolled in the WCSD to determine that the proposed 1995-1996 IEP did not satisfy the IDEA's requirements. The Court must measure the appropriateness of an IEP as of the time that the school system offers it to the student. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) ("the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date"); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1216 (E.D. Pa. 1993) (noting that evaluation of child's progress in alternative placement is not relevant to determination of appropriateness of proposed IEP). The Court therefore cannot consider Jensine's performance and record at the Orange Grove Center when determining whether the proposed 1995-1996 IEP was inadequate.

Even without considering Jensine's performance and record at the Orange Grove Center, however, the Court concludes that the preponderance of the evidence establishes

that the proposed 1995-1996 IEP was not reasonably calculated to provide Jensine with educational benefit. The Court believes that the proposed 1995-1996 IEP failed to satisfy the IDEA's requirements for three reasons.

First, the proposed 1995-1996 IEP did not contain a provision concerning increased one-on-one instruction. Dr. Wigley recommended that Jensine receive more individualized, one-on-one instruction. (Admin. Hr'g Tr. at 86, 108; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) Ms. Morgan also testified that Jensine could not accomplish a task unless Ms. Morgan or the classroom paraprofessional stayed with Jensine and assisted her until she completed the task. (Admin. Hr'g Tr. at 54, 61.) Additionally, Ms. Morgan testified that she and the classroom professional often could not provide one-on-one instruction to Jensine because they had to assist the other children in the classroom. (Admin. Hr'g Tr. at 400-02.) Given this evidence, the Court concludes that additional one-on-one instruction was necessary for Jensine to accomplish classroom tasks and obtain educational benefit. The Court therefore finds that the proposed 1995-1996 IEP failed to provide Jensine with adequate one-on-one instruction.

Second, the proposed 1995-1996 IEP failed to provide adequate procedures for addressing Jensine's self-abusive behavior. Jensine began to engage in self-abusive behavior during October 1994, and this self-abusive behavior continued throughout the 1994-1995 school year. The proposed 1995-1996 IEP, however, did not include a specific behavior management plan for Jensine. (Resp'ts' Docs. at 0337-0355.) Instead, the proposed 1995-1996 IEP provided that WCSD personnel would use "behavior modification strategies" and "time-out" to address Jensine's self-abusive behavior. (*Id.*) Similar tactics, however, had not resolved Jensine's self-abusive behavior during the 1994-1995 school year. Even Plaintiffs' expert, Dr. Marcus, stated that he "might have

recommended" that Plaintiffs develop a behavior management plan for Jensine if she engaged in an on-going pattern of self-abusive behavior. (Admin. Hr'g Tr. at 347-49.) Dr. Marcus also testified that "time out" was not an appropriate method for addressing Jensine's self-abusive behavior. (*Id.* at 349.)

Given the severity and frequency of Jensine's self-abusive behavior, the Court concludes that Jensine's self-abusive behavior required the development of a specific behavior management plan to permit Jensine to obtain educational benefit. *JSK*, 941 F.2d at 1573 (stating that IEP's adequacy must be determined on case-by-case basis). The Court therefore finds that Plaintiffs should have included a behavior management plan in the IEP that Plaintiffs proposed for Jensine for the 1994-1995 school year, rather than simply providing that WCSD personnel would use vague "behavior modification strategies" and time-out strategies to address Jensine's self-abusive behavior. The Court thus concludes that the proposed 1995-1996 IEP was inadequate because it did not provide Jensine with an adequate behavior management plan.

Third, the proposed 1995-1996 IEP failed to provide Jensine with an adequate summer or extended year program. The proposed 1995-1996 IEP contains no specific reference to extended year services. (Resp'ts' Docs. at 0337-0355.) The evidence reveals that Plaintiffs eventually offered to provide Jensine with a five-week summer program at the Rock Springs Elementary School. (Admin. Hr'g Tr. at 149, 189; Resp'ts' Docs. at 0359.) That program, however, provided only three hours per school day of educational services for Jensine. (Admin. Hr'g Tr. at 149, 189; Resp'ts' Docs. at 0359.)

The professionals at the Emory Autism Resource Center recommended that Jensine receive a full, twelve-month

school year for her education. (Resp'ts Docs. at 0176; Pet'rs' Ex. 26; Pet'rs' Ex. 21 (Orange Grove Ctr. Docs.).) Dr. Wigley also testified that he believed that Jensine required an extensive summer program for the summer of 1995 because Jensine had reached a critical stage in the development of her language skills. (Admin. Hr'g Tr. at 84-95, 87, 112-13; Resp'ts' Docs. at 0320; Pet'rs' Ex. 44; Pet'rs' Ex. 14 (Orange Grove Ctr. Docs.).) The Court believes that the five-week, three-hour-per-day summer program that Plaintiffs offered to Jensine falls short of providing Jensine with the amount of summer services that Jensine required. The Court therefore concludes that the proposed 1995-1996 IEP failed to provide Jensine with adequate extended-year services.

For the reasons discussed above, the Court concludes that the proposed 1995-1996 IEP did not provide Jensine with the educational services that Jensine required in order to benefit from her education. Because the proposed 1995-1996 IEP did not provide Jensine with educational services that she required to benefit from her education, Plaintiffs did not provide Jensine with a "basic floor of opportunity" for the 1995-1996 school year. *JSK*, 941 F.2d at 1573. Plaintiffs therefore failed to satisfy the IDEA's free, appropriate public education requirement for the 1995-1996 school year. Defendants thus have satisfied the first portion of the test for obtaining reimbursement.

b. Whether the Orange Grove Center Was an Appropriate Placement for Jensine

Plaintiffs next argue that Defendants cannot satisfy the second requirement for obtaining reimbursement because the Orange Grove Center was not an appropriate placement for Jensine. Specifically, Plaintiffs claim that the Orange Grove Center was not the least restrictive environment for Jensine.

The IDEA requires States receiving federal funds for educating handicapped children to establish procedural safeguards to assure:

> to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

§ 1412(5)(B); *see also* 34 C.F.R. § 300.550 (requiring public agencies to ensure that handicapped children are educated with nonhandicapped children to the maximum extent appropriate). Congress thus has "created a statutory preference for educating handicapped children with nonhandicapped children." *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991), *vacated on other grounds*, 956 F.2d 1025 (11th Cir.), *reinstated in part*, 967 F.2d 470 (11th Cir. 1992).

Defendants argue that this Court previously has indicated that the least restrictive alternative requirement applies only if the IEP that the school system proposes meets the requirements of the IDEA. In *Greer v. Rome City School District*, 762 F. Supp. 936 (N.D. Ga. 1990), *aff'd*, 950 F.2d 688 (11th Cir. 1991), this Court adopted an analysis for determining whether a school system has satisfied the least restrictive environment requirement. 762 F. Supp. at 942. The Court stated:

> It is evident from the analysis of the applicable law that the Court's inquiry must proceed along two fronts, each with two subparts. First[,] the Court must decide whether [the student] is receiving the "free appropriate public education to which she is entitled." Second, assuming that she is, the Court must then decide whether that

> education is taking place in the least restrictive environment.

Id. The Court thus implied in *Greer* that the least restrictive environment analysis applies only where the Court concludes that the school system has provided a student with a free, appropriate public education. The Court now expressly states that the least restrictive analysis does not apply when, as here, the school system fails to provide a student with a free, appropriate public education.

The Court finds support for this conclusion in an opinion from the United States Court of Appeals for the Seventh Circuit. In *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162 (7th Cir. 1994), the Seventh Circuit stated that the least restrictive environment or mainstreaming requirement "was developed in response to school districts which were reluctant to integrate mentally impaired children and their nondisabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums." 41 F.2d at 1168. Because the IEP the school system offered did not meet the IDEA's minimum requirements, the court concluded that the least restrictive analysis did not apply. *Id.*

The Court concluded *supra* Part III.C.3.a. that the proposed 1995-1996 IEP was not reasonably calculated to provide Jensine with a free, appropriate public education. Because the Court has concluded that the proposed 1995-1996 IEP failed to satisfy the IDEA's requirements, the least restrictive environment analysis is inapplicable to this case. The Court next must examine whether the Orange Grove Center was an appropriate placement for Jensine for the 1995-1996 school year. The Court agrees with the ALJ's conclusion that the Orange Grove Center was an appropriate placement for

Jensine for the 1995-1996 school year. In particular, the Court notes that the Orange Grove Center provided Jensine with the following services that Jensine's educational needs required: (1) speech and language therapy; (2) a behavior management program; and (3) increased one-on-one instruction using the TEACCH method. (Admin. Hr'g Tr. at 190, 197-98, 211, 222-24, 238, 243-44.) In light of the frequency and severity of Jensine's self-abusive behavior and her critical need to develop her language skills, the Court also agrees with the ALJ's conclusion that Jensine's need for these services during the 1995-1996 school year outweighed her need for exposure to non-disabled or typical peers in the classroom setting. The Court therefore concludes that the Orange Grove Center was an appropriate placement for Jensine for the 1995-1996 school year.

4. Summary

In sum, the Court concludes that: (1) the proposed 1995-1996 IEP failed to provide Jensine with a free, appropriate public education; and (2) the Orange Grove Center was an appropriate placement for Jensine for the 1995-1996 school year. The Court therefore grants Defendants' Motion for Final Judgment with respect to their claims associated with the 1995-1996 school year.

The Court also concludes that the equities of this case require Plaintiffs to reimburse Defendants for their costs of placing Jensine in the Orange Grove Center during the 1995-1996 school year. Plaintiffs must reimburse Defendants at a rate of $62.65 per school day, plus mileage of seventy-eight miles per school day at the rate of twenty-five cents per mile.[9]

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[9] The ALJ's decision directed that Defendants receive compensation for mileage associated with transporting Jensine to and from the Orange Grove Center at a rate of twenty-five cents per mile. (Compl. Corrected

Because the Court cannot determine from the record how many days Jensine attended the Orange Grove Center during the 1995-1996 school year, the Court orders Defendants to submit a document within eleven days stating the number of days that Jensine attended the Orange Grove Center during the 1995-1996 school year.

D. Defendants' Claims Concerning the 1996-1997 School Year

Defendants argue that the ALJ erred by refusing to reimburse Defendants for their costs of educating Jensine during the 1996-1997 school year. The ALJ denied Defendants' request because Plaintiffs had not developed an IEP for Jensine for the 1996-1997 school year, and the ALJ therefore could not determine what services Plaintiffs would have offered to Jensine for that year. (Compl. Corrected Ex. A at 23.)

Defendants argue that the IDEA requires a school system to develop an IEP for each of its students covered by the IDEA on an annual basis. Defendants claim that, in spite of their refusal to attend an IEP meeting, the IDEA required Plaintiffs to develop a proposed IEP for Jensine for the 1996-1997 school year and to present that proposed IEP to Defendants.

The Eleventh Circuit has not addressed the question whether the IDEA requires a school system to develop, review, and revise, on an annual basis, an IEP for a student whose parents unilaterally have placed her in a private school. At least one court, however, has concluded that a school system has no obligation to develop an IEP for a student whose parents have unilaterally withdrawn her from the

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Ex. A at 22-24.) Neither Plaintiffs nor Defendants argue that another mileage rate is more appropriate.

school system and placed her in a private school. *Carl D. v. Special Sch. Dist.*, 21 F. Supp. 2d 1042, 1057 (E.D. Mo. 1998). The *Carl D.* court reasoned that 34 C.F.R. § 300.341(b), which requires a school system to develop an IEP for a student enrolled in a private school, applies only where the school system placed the student in the private school or referred the student to the private school. *Id.* The court noted that 34 C.F.R. § 300.341(b) "contemplates the [school system's] active participation in the placement of the student at a private facility." *Id.* The court found that "a school [system] has no input in the placement decision when a child is unilaterally withdrawn from public school by the parents." *Id.*

The Court finds that the *Carl D.* court's reasoning is persuasive, and applies that reasoning to this case. After Defendants unilaterally withdrew Jensine from the WCSD and placed her in the Orange Grove Center, the WCSD had no reason to expect that it needed to develop IEPs for Jensine for future school years. The WCSD did not refer Jensine to the Orange Grove Center or participate in her placement at the Orange Grove Center. The WCSD therefore had no obligation under the IDEA to prepare an IEP for Jensine covering the 1996-1997 school year. The Court therefore denies Defendants' Motion for Final Judgment with respect to their claims for the 1996-1997 school year.[10]

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[10] As a practical matter, the Court questions how Plaintiffs could have developed an adequate IEP for the 1996-1997 school year for Jensine. Jensine had attended the Orange Grove Center for a year when Plaintiffs offered to develop an IEP for her covering the 1996-1997 school year. During that year, no one in the WCSD had seen or evaluated Jensine. (Resp'ts' Docs. at 0376-0377.) Defendants refused to allow Plaintiffs to evaluate Jensine, and refused to permit Plaintiffs to have access to Jensine's records at the Orange Grove Center. (*Id.*) Under these circumstances, Plaintiffs did not have accurate information concerning

IV. Conclusion

ACCORDINGLY, the Court GRANTS IN PART AND DENIES IN PART Defendants' Motion for Final Judgment and Relief on *De Novo* Review [38]. The Court GRANTS Defendants' Motion with respect to Defendants' claims concerning the 1995-1996 school year and DENIES Defendants' Motion with respect to Defendants' claims concerning the 1994-1995 and 1996-1997 school years.

The Court ORDERS Plaintiffs to reimburse Defendants for their costs of educating Jensine at the Orange Grove Center during the 1995-1996 school year. The Court ORDERS Defendants' to submit a statement within eleven days showing the number of days during the 1995-1996 school year that Jensine attended the Orange Grove Center. The Court DIRECTS the Clerk to dismiss this case.

IT IS SO ORDERED, this the 25th day of February, 1999.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

Jensine's current educational needs that would permit them to develop an adequate IEP for Jensine covering the 1996-1997 school year.

APPENDIX C

[Filed Feb. 10, 1997]

BEFORE THE OFFICE OF STATE
ADMINISTRATIVE HEARINGS
STATE OF GEORGIA
(On Behalf of the Georgia Department of Education)

Docket No. OSAH-DOE-97-004

IN THE MATTER OF:

JENSINE B.

Petitioner,

and

WALKER COUNTY SCHOOL SYSTEM,

Respondent,

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Background

The parents of an eight year old female (hereinafter the "student") requested a due process hearing under the Individuals With Disabilities Education Act (IDEA), 20 USC § 1400, *et seq*. The student is severely developmentally delayed with a primary diagnosis of autism.

The student was enrolled in the local public school system (Walker County School District—WCSD) from age three (1991) until age seven (1995). After approximately four years in the public school system, the parents unilaterally withdrew the student from public school in June of 1995, and placed the student in a private institution, Orange Grove Center in Chattanooga, TN, where the student is currently enrolled. The parents contend the student was withdrawn because she had made no meaningful educational progress and the 1995-1996 IEP was inappropriate for the student's individual needs. The

school system contends that at all times it has provided or offered a free, appropriate public education based on the student's individual disabling condition and which afforded the student at least the basic floor of educational opportunity in the least restrictive environment as required by law.

II. Findings of Fact

Historically, the student's parents reported that they began noticing problems in the student's development between the ages of two and three. The student was initially taken to her pediatrician, who referred the family to a neurologist and a psychologist. It was noted at age two that the student had autistic-like tendencies. Approximately one month before the student's third birthday, the parents contacted the WCSD to request pre-school special education services. On October 29, 1991, the student was evaluated by the WCSD and was determined eligible for a program for severely intellectually disabled students. This eligibility report found that the student "suffers from such pervasive and severe developmental delays that any alternative approaches provided by a regular pre-school program would most likely not meet the student's needs." (See R-051). On September 31, 1991, approximately 45 days after the student's third birthday, and within thirty days of the evaluation, the WCSD conducted a staffing meeting and determined that the student should be placed, on a interim basis, in a facility-based pre-school special education program for severely intellectually disabled children. (See R-58). During the student's third year, and into the spring of 1992, she was evaluated further at Emory University and by other experts who confirmed the diagnosis of autism and recommended certain behavior management objectives and educational prerogatives. In May of 1992, a second IEP meeting was held wherein the student's developmental delays and other deficits were noted. At this IEP meeting, her primary handicapping condition was labeled as autism/MI (mentally impaired) and it was determined that she

should be placed in a facility-based resource program for 22 hours per week with speech/language consultation and services provided. The student was determined eligible for extended year services in the summer of 1992, and in fact received such services at the Discovery Junction Learning Center (a privately operated day care center) near her home.

The IEP for the student was reviewed in October 1992, and the staffing committee determined that the goals and objectives in the IEP were being met, and noted that the student "is gradually making progress." Under this IEP, the student received 22½ hours per week of special education services, including two home visits per week. The parent requested at this meeting that the student receive 30 hours per week, daily exposure to normal peers, and additional speech therapy on a one-to-one basis.

The staffing committee reconvened in February 1993, and the IEP was amended to include additional speech and language therapy. The IEP again contained extended school year provisions for the summer of 1993.

In August of 1993, the Emory University School of Medicine conducted a comprehensive psychiatric evaluation of the student. This report (R-176) recommended several educational objectives, including participation in an educational treatment program for approximately 30 hours per week in a full-day 12 month a year program to maximize progress and prevent regression. The report also calls for the student to have access to typical peers. The report also suggests using a system of positive reinforcers, certain behavior modification techniques for reducing the student's self-stimulatory behavior, and involving a specialist with expertise in autism to assist in the design of the student's education and treatment programs. Further, in March of 1993, an IEP review meeting was held. The IEP was again reviewed on June 3, 1994 (R-194). In this IEP, it was recommended that the student receive 24 hours per week of self-contained

special education in the Rock Spring School, which would include five hours per week of interaction with typical peers at lunch, recess and library.

In April of 1995, a psychoeducational report was prepared pursuant to further evaluations of the student (R-291). In addition, the student had been recently evaluated by the Georgia Project for Assisted Technology for the purpose of determining the need for augmentative communication. The report concludes that the student's performance on the achievement tests indicated cognitive ability which approximated a 19 month level which is far below her chronological age of 79 months at the time of testing. Similar tests revealed significant developmental delays in virtually all areas except for gross and fine motor skills, which were strengths for the student. The report further concludes that the student is eligible for autism services under state guidelines. The report concludes that the student needs much "language stimulation in the classroom in addition to continued speech and language therapy." The report also calls for frequent exposure to an interaction with regular classroom peers in order to provide positive behavior models whenever possible.

In June of 1995, the student was evaluated by a psychologist in Chattanooga, Tennessee, Dr. Ronald Wigley. On June 6, 1995, Dr. Wigley issued a report in which he stated in part, presently, this student's "ability to benefit from education is severely restricted by a marked abnormality in her production of speech and her marked impairment in her ability to initiate or sustain a communication with others." Dr. Wigley indicated that beginning in the summer, the student should receive "more intensive instruction one-on-one" and specifically that the student would benefit from attending a private school (Orange Grove) that summer as part of an extended year program. Furthermore, Dr. Wigley found that for the student's next school year, the student would benefit from one-on-one instruction that is more intensely oriented toward developing her speech and language abilities.

On or about June 9, 1995, the parent wrote a letter to the school system in which she stated that in the fall of the previous year, 1994, (the student) became self-abusive. She also stated that she was enclosing a copy of Dr. Wigley's letter and requested that his recommendations be included in the school system's IEP for the upcoming 1995-1996 school year. The parent also requested the services of a certified licensed occupational therapist, as well as a licensed therapist who had been trained in the field of sensory integration. On June 12, 1995, an IEP meeting was conducted. Although the minutes of the IEP meeting (R-333) indicate that the speech/language goals were approved by the parents, the parents declined to sign the IEP. The committee concluded that for the 1995-1996 school year, the student should be placed in a self-contained autism program with the inclusion of speech/language therapy and an occupational therapy evaluation. The parents did not sign the IEP indicating that there were unanswered questions regarding an extended school year and there was a lack of commitment for occupational therapy. The IEP calls for 27 hours and 20 minutes of instructional educational services per week, including 2 hours and 40 minutes of regular education classes "library with kindergarten, 30 minutes per week; PE with kindergarten, 30 minutes per week; 20 minutes per day in kindergarten for pre-academics."

Subsequent to the IEP meeting in June, the school system rejected the parent's request that the student be placed at the Orange Grove Center and substituted an extended year program within the WCSD. Neither did the WCSD offer any occupational therapy services as requested by the parent and recommended by several evaluators. On June 24, 1995, the parent wrote a letter to the school system indicating that the parents were still requesting placement at Orange Grove. On August 18, 1995, another special education placement committee meeting was held at which time the parents instructed the school system that the parents had placed the student at

Orange Grove "because they felt that her needs have not been met in her present program" in the WCSD. (R-365). The placement committee contends that the student's appropriate placement was at the Rock Spring School within the WCSD. (R-368).

The student was unilaterally placed by the parents in the Orange Grove Center in the summer of 1995. According to the social history narrative taken at Orange Grove, the parents have been "very unhappy with the student's educational program in Walker County and with their daughter's autism diagnosis, the setting at Orange Grove would be more beneficial." See P-12. On or about September 20, 1995, and after the student had been placed at Orange Grove, a psychological assessment was conducted by the Team Evaluation Center in Chattanooga, Tennessee. The purpose of the assessment was to determine continued eligibility for special education placement and services. The diagnostic conclusions contained in the report (see R-13) indicated the student's primary disabling condition as autistic disorder, in which the examiner noticed that the student shows gross impairments in reciprocal social interaction communication and restricted and stereotyped patterns of behavior, interests and activities. The report also indicates the student to be diagnosed as mentally retarded, with the severity unspecified. In this regard, the examiner found that the student is too impaired to be successfully assessed by standard intelligence tests, although other tests estimate overall functioning to be just below a two year old level. An earlier psychoeducational report was conducted by the WCSD in April of 1995, which contained many of the same conclusions as the foregoing report. The WCSD report specifically found that "according to the *Georgia Department of Education Special Education Regulations and Procedures*, it appears that the student may be eligible for autism services based upon her low cognitive ability level and delayed developmental skills." The WCSD report further concludes that the student will "certainly need

much language stimulation in the classroom in addition to continued speech and language therapy."

The speech and language pathologist from Orange Grove testified that the student has responded well to the use of communication pictures, and her self-abusive behavior has substantially decreased (T-I-200). The student's classroom teacher stated that she has used the *TEACCH* method for over ten years (T-I-218). She further testified that the student could not at the beginning of the school complete any of her assigned tasks; now, however, the student is able to complete eight tasks each day (T-I-230). There is a behavior management plan in place for the student at Orange Grove which is working well for her (T-I-238). The student is receiving speech/language therapy for one hour per week and occupational therapy for one hour per week (T-I-244). The student needs occupational therapy in order to receive an appropriate education to address her tactile and sensory processing (T-I-245).

III. Conclusions of Law

The Individuals with Disabilities Act (IDEA), 20 USC 1400, *et seq.* requires a school district to provide a free, appropriate public education to children with disabilities. A free appropriate public education (FAPE) includes special education and related services which a) have been provided at public expense under public supervision and direction without charge; b) meets the standards of a state educational agency; c) includes an appropriate elementary or secondary education in the state involved; and d) are provided in conformity with an Individualized Education Plan. *Burlington School Committee v. Dept. of Ed. of Massachusetts*, 471 US 359 (1980).

For the school district to meet its duty of providing a free, appropriate public education, it is required that the education provided confers educational benefit upon the disabled child.

Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982), 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982). The United States Supreme court in *Rowley* established a two-pronged test to determine whether a local school district is providing a disabled student with an appropriate IEP. The first prong is to determine whether the school district has complied with the administrative procedures set forth in the act; the second prong is to determine whether or not the individualized education program is reasonably calculated to allow the child to achieve educational benefit.

Georgia's Special Education Regulations and Procedures address autism as a disability which qualifies a student for special education services under IDEA.

It is undisputed by the parties that the student qualifies for special education services under the general classification of autism. The educational services have as a blueprint an "Individualized Education Program" (IEP) which is a written statement for each child with a disability developed in a meeting by a representative of the local educational agency along with the teacher, the parents or guardian of such child, and others. This IEP shall include, *inter alia*, a statement of the present levels of performance, annual goals and objectives, a statement of educational services to be provided and the extent to which such child may participate in regular (i.e., mainstreamed) programs, the dates that such services are to be provided, and the objective criterion evaluation procedures for determining, at least on an annual basis, whether the instructional objectives are being achieved. The IEP forms the basis for the handicapped child's entitlement to an individualized and appropriate education. As such, its development and formulization are the focus of a host of procedural requirements (see 34 CFR 300). These requirements include, among other things, the timing and methods of evaluating and classifying a child's handicap, the notification that must be given parents or guardians prior to school action

regarding the child's educational placement, the procedures for reevaluation, and other similar provisions. Under the IDEA, parents are entitled to prior written notice whenever an educational agency proposes or refuses to initiate a change in the evaluation of educational placement of the child, or in the provision of a free, appropriate public education (20 USC 1415(b)(1)(C)). If parents are dissatisfied with the educational program offered by the school, the parent or guardian is entitled to an impartial due process hearing before a state-approved administrative law judge (20 USC 1415(b)(2)).

The State Board of Education of the State of Georgia has adopted a policy of providing a free, appropriate public education opportunity to all eligible students with disabilities within all public agencies of Georgia. Students with disabilities include those students who are autistic (see Georgia Special Education State Program Plan, FY94-96, page 12). The State Program Plan, on page 28, provides that for a student with disabilities who is not receiving special education services, an individualized planning conference will be conducted and an IEP developed within 30 days of determination of the student's eligibility for special education. The IEP, including short-term instructional objectives, must be in effect prior to a student receiving special education or related services. IEP's are to be implemented as soon as possible following the IEP meetings.

If a parent believes that a school district has failed to offer a free, appropriate public education as assured by the Individuals with Disabilities Education Act, the parent may place an eligible child in an appropriate private program. The program into which the child is placed must, however, be primarily for educational purposes, and not primarily for psychiatric or other medical reasons. See *Burlington*. An appropriate public education, however, does not mean absolutely the best or "potential maximizing" education for the individual child, but rather the states are obliged to

provide a "basic floor of opportunity" through a program individually designed to provide educational benefit to the handicapped child. *Rowley*, 458 US 201. Thus, if a parent unilaterally places their child in a private program without the knowledge or consent of the local school district, the parent must prove that (a) the child was eligible to receive special education services; (b) that such services were not being delivered, or that such services were inappropriate and violative of either the procedural or substantive mandates of the Act; (3) that the placement by the parents was necessary to benefit the child educationally; and (4) that such program into which the child was placed is an "appropriate" educational program. See *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994); *Hall, by and through Allread v. Freeman*, 700 F. Sup. 1106, 1119 (N.D.Ga. 1987); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (1981); *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990).

The Eleventh Circuit has recently addressed *Rowley* in the case of *JSK by and through JK v. Hendry County School Bd.*, 941 F.2d 1563 (11th Circuit 1991). Within the context of *Rowley*, the *JSK* court evaluated the specific language from *Rowley* which states "in seeking to provide such access to public education, Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful." *Rowley*, 458 U.S. 192. The 11th Circuit held in this instance that "meaningful" only modified the term "access" and further stated that the intent of the federal statute was more to open the door of public education to handicapped (now disabled) children on appropriate terms than to guarantee any particular level of education once inside. The Court concedes, however, that the standard of "any progress" is too low, when reviewing IEP's. The *JSK* Court found that there can in fact be no universal measure of "some educational benefit" and concluded that each case should be reviewed upon its merits

rather than attempting to articulate any particular formula for determining the adequacy of educational benefits conferred by any given IEP. The *JSK* Court held as follows:

> Following *Rowley*, we hold today that the State must provide to the handicapped child personalized instruction and services that meet state educational standards and that comport with the child's IEP, which must be formulated according to EAHCA requirements. *Rowley*, 458 U.S. 203. We also stress that when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. *Todd D. v. Andrews*, 933 F.2d 1576 (11th Circuit 1991).

The Court goes on to find that if the educational benefits are adequate based on surrounding and supporting facts, EAHCA (now IDEA) requirements have been satisfied. "While a trifle might not represent adequate benefits, maximum improvement is never required." (*JSK*, supra). Adequacy must be determined on a case-by-case basis in the light of the child's individual needs. In short, the hearing officer determines that the 11th Circuit Court has essentially concluded that local school systems must provide a program which provides an educational benefit greater than a "trifle," but less than the maximum educational opportunities available under any conceivable optimized plan of education. Thus, each case must be reviewed to determine whether an IEP is properly designed to afford disabled students a reasonable opportunity to receive "adequate" educational benefits.

IV. Decision

The central issue in this case is whether the parent should be awarded reimbursement for the cost of the student's education at the Orange Grove Center as well as travel and

other miscellaneous costs attendant to the parents' unilateral placement of the student in that facility. The parents contend that the WCSD has been unable to provide an appropriate educational placement; that progress has been trivial at best; and, the student began regressing her last year in the school system by exhibiting numerous instances of self-abusive behavior.

The school system argues that previous IEP's and efforts by the school system to provide an educational setting in compliance with *Rowley* prior to the 1995-1996 school year are not in issue, and are irrelevant, based upon the fact that the parents rejected the proposed 1995-1996 IEP, and at that time unilaterally placed the student at a private school. Furthermore, the school system contends that the parents waited almost one full year after placing the student in a private school before requesting a due process hearing which renders the claim time-barred.

For the reasons cited herein, I conclude the parents were justified in placing the student at Orange Grove and should be awarded reimbursement for the costs of such placement for the 1995-1996 school year.

With regard to the school system's defense that the parent's claim is time-barred, I have not found any statute of limitation or other persuasive legal precedent which would disallow the parents' claim because it was made approximately eleven months after the parents removed the student from the public school. Neither do I find that waiting eleven months before making a claim constitutes an equitable bar under the theory of *laches* or any other equitable doctrine. Thus, I conclude the parents' claim in this matter is not time barred.

In determining that the WCSD has failed to meet its legal requirements under IDEA, I have reviewed all of the evidence, but find the following evidence to be particularly probative:

1) Speech and language evaluation by Anna Davenport on July 19, 1991, approximately two months before the student's third birthday revealed the student exhibited severe receptive and expressive language delays and a behavior disorder. Recommended therapy included twice weekly sessions to focus on developing behavior and improving receptive and language skills (R-13).

2) On August 23, 1991, approximately one month before the student's third birthday, the parent reported the student's disability to the school system, and requested appropriate evaluations.

3) On or about August 1 and 7, 1991, approximately two weeks before the student's third birthday, a psychological evaluation was performed by Dr. Hillner which recommended the parents consider a program which contained speech and language services as well as further psychological evaluations.

4) On or about July 19, 1991, on or about the student's third birthday, the parents consented for the student to receive various evaluations (R-24).

5) On or about September 27, 1991, the student received the *Battelle Developmental Inventory* which indicated the child had a weakness in expressive language.

6) On or about October 29, 1991, an eligibility report stated that the student was eligible for services under the category of severely intellectually disabled. This report was prepared by Tracy O'Connor, Psychomotrist (R-52).

7) On or about August 31, 1991, an IEP meeting was held to provide interim services for the student. The meeting was attended by the student's pre-school teacher, a speech/language pathologist, and a special

education supervisor, as well as the parent. This IEP provided that the student would be placed in a facility-based program for 7 hours per week, pending further evaluations (R-53). This IEP does not indicate how much, if any, speech/language services were to be provided.

8) On October 31, 1991, the parent signed a form agreeing with the student's placement within the public school system (R-50).

9) On or about December 31, 1991, the parent forwarded to the school system a psychological study from the Marcus Developmental Resource Center at Emory University which stated in part "it is critical that (the student) be in a structured pre-school setting with behavioral contingencies." One of the evaluations recommended the *TEACCH Program* being utilized at Orange Grove;

10) On or about February 17, 1992, Dr. Chien, a pediatric neurologist, recommended that the student receive 6 hours of school per day along with speech therapy and behavioral modification (R-70).

11) On or about April 23, 1992, the Georgia Center for the Multi-Handicapped forwarded a comprehensive evaluation of the student along with recommended approaches for providing an appropriate educational program. This report also indicates the student's then current level of cognitive functioning was assessed through the administration of various tests and batteries, all of which indicated developmental delays. The *Bailey Test* indicated an age equivalent of 15-16 months (R-81).

12) On or about March 17, 1992, Dr. Puri, a child psychiatrist, diagnosed the student with pervasive developmental disorder (PDD) and autism. Dr. Puri

recommended a pre-school program focused on stimulation of eye contact, maintaining one-on-one interaction, and learning to relate socially. Dr. Puri also recommended that the student receive speech and language therapy regularly, *as well as occupational therapy.*

13) On or about March 19, 1992, a pre-school special education eligibility report determined that the student was eligible for services under severely developmentally delayed criteria (R-97).

14) On or about May 14, 1992, an IEP meeting was held to consider the various evaluations of the student which had been developed since the first IEP meeting the previous October. The committee recommended that the student receive facility-based resource programs for 22 hours per week, with special transportation provided, and a consultation with the speech therapist. The minutes at R-121 indicate that summer speech/language services were discussed and concluded that the committee "will look into eligibility for those services."

15) On October 6, 1992, a staffing committee again convened and concluded that the goals of the previous IEP were being implemented in the facility-based program. The minutes reflect that the parents were requesting an additional 4-6 hours of speech therapy per week (R-126). This meeting was attended by two administrators from the school system, a parent volunteer and the classroom teacher and the parent.

16) R-131 is a speech/language consulting report which was generally complimentary of the student's then current educational program, and recommended individual speech/language therapy 2 times per week, 30 minutes per session.

17) On or about February 11, 1993, the staffing committee met to review the present level of performance and to specifically review the speech and language area. It was determined that the student would receive 20 hours per week of classroom instruction, 2 hours per week of home visits, and 1 hour per week of speech and language therapy (R-153).

18) The next IEP meeting was conducted in June of 1993 which continued the services previously offered with the addition of extended school year providing summer services for 20 hours in 1993.

19) R-170 is an evaluation from the Emily Autism Resource Center which concludes that the student would benefit by participating in an educational treatment program for 30 hours per week. The report further states that "ideally, a full day, twelve month per year program is recommended in order to maximize progress and prevent regression." The report further contends that a specialist with expertise in autism should be involved in the design of the student's educational program. The student's teacher should receive on-going specialized training in the area of autism.

20) In June of 1994, the IEP was again reviewed and it was determined that the student would receive 24 hours per week in a special education classroom, 5 hours per week in a regular education class (lunch, recess and library) and 1 hour per week of speech/language therapy.

21) In January of 1995, the Georgia Project for Assistive Technology performed an assessment, which strongly recommended *use of communication aids*; the use of photographs and line-drawings to augment communication; to give the student many opportunities

throughout the day to make choices which can be done by presenting choices on the communication device or through the use of the objects and pictures symbols [sic]; and other recommendations in her classroom.

22) On April 17, 1995, the WCSD conducted another psychoeducational report (R-291) which among other things indicated the student *continues to function at approximately the 19 month level* (see R-293). The report further indicates the student functioned in terms of communication skills on an approximate 6 month level, social skills on a 12 month level, pre-academic skills on a 15 month level, self-help skills on a 22 month level and physical skills on an approximate 24 month level. On the test of early language development-2, the report indicates that the student scored a language quotient of below 65, "which is classified as very poor."

23) On June 12, 1995, the WCSD convened a special education placement committee, which meeting was attended by several representatives from the WCSD as well as both parents. According to the staffing committee notes (R-330), the options considered for the student's placement were (a) a resource room for autism (b) a self-contained classroom for autism (c) speech and language services, and (d) occupational therapy. The report further indicates the need for increased amounts of speech and language therapy "as (the student) is at a crossroads in terms of initiating communication." The parents requested occupational therapy services, and the school system agreed to conduct an evaluation to determine whether such services would be appropriate. The school participants recommended that the student be placed in the special education program for autism with speech and

language services and that the student participate in "mainstream activities" with a kindergarten class. At the conclusion of the meeting, the parents declined signing the IEP due to "unanswered questions concerning extended school year and occupational therapy."

In addition to the foregoing records, I have considered the testimony of both Dr. Wigley and Dr. Marcus. It is noted that Dr. Wigley stated that he was not an expert witness for either side, but was only testifying on behalf of the student. Dr. Wigley testified that he observed a classroom setting which was not harming the student but needed improvements especially in the areas of increased amounts of speech and language services and *behavior modifications*. Further, Dr. Wigley recommended that the student attend Orange Grove for the summer of 1995 because she was at a critical juncture with her development. Dr. Wigley observed the student at Orange Grove just prior to the hearing and found that she is now much more verbal, she is better able to stay on task, and she had decreased the use of self-stimulatory behavior (T-I, p. 97).

Dr. Marcus, the expert retained by the school system, is the clinical director of the TEACCH Center at the University of North Carolina School of Medicine, and is an expert in autistic children. Dr. Marcus stated that "(the student) has received *reasonably appropriate* educational experiences since she first entered school through her current placement. Over the years, her teachers and support staff have learned about her, made adjustments in their programming to better meet her needs, and have continued to try to help her to reach her potential." Further, Dr. Marcus testified that the 1995-1996 [sic] was reasonably calculated to provide the student with educational benefit (T-II, p. 316, 374). Dr. Marcus also found the Orange Grove program to be adequate for the student's needs (T-II-373).

The IDEA requires states to ensure that students with disabilities are educated "to the maximum extent appropriate . . . with children who are not disabled." (20 USC § 1412 (5)(B)). The school system argues that because the student's IEP contains provisions for some "mainstreaming" during lunch, recess, and library, the county system clearly offers a program in the least restrictive environment. The parents argue that least restrictive environment is not an issue because the local school program is so clearly inappropriate, and has so clearly failed the student, that it cannot be considered the least restrictive environment.

The family does not contend that the school system has made any procedural errors so as to invalidate the IEP under IDEA. An examination of the records does not reflect any substantive procedural errors so as to invalidate the IEP. Thus, the only remaining question is whether under *Rowley*, the WCSD failed to offer the student a program which affords her a basic floor of opportunity in which she can benefit from a public education.

In answering this question, I have taken into consideration the fact that the extent of the student's disability would present any educator an extreme challenge in providing an education. It is the very fact, however, that the disability is so severe which calls for extraordinary measures by the public entity to create an "appropriate" educational experience. A number of evaluations have been conducted, as identified previously in this decision, which have provided guidance and support to the public school system in order to provide an appropriate education for the student.

The public system adopted some of the continuing recommendations by evaluators and declined to implement other recommendations. The WCSD declined to adopt other recommendations from the evaluators. For example, the Marcus Developmental Resource Center in 1991 recommended that "it is critical that the student be in a structured

pre-school setting with behavioral contingencies" (P-17). In 1992, the Georgia Center for the Multi-Handicapped stated that the student needs "one-on-one interaction, speech and language therapy, occupational therapy, and the parents need instruction as to how to best work with the student" (P-28). In 1992, Dr. Puri recommended, *inter alia*, occupational therapy. Also in 1992, the Orange Grove Center recommended that the student be provided an education in a "highly structured, consistent, predictable environment" (P-27). In 1993, the Emory Autism Resource Center recommended that a specialist in autism be involved in the design of the student's educational program (P-26). In addition to the foregoing, virtually all experts recommended that the student receive full year educational services in order to prevent regression and reinforce communication and language skills at this critical juncture in her life. It is in these critical areas, i.e., behavior management, occupational therapy, full twelve month extended services, and communication aids, where the WCSD has failed to provide FAPE for the student most demonstrably.

In or about October of 1994, the student began self-injurious behavior. Such behavior took the form of head-banging and slapping her head and her body. The behavior was so severe that she received bruises and other physical marks on her head and body. According to the parent, such behavior persisted almost daily throughout the remainder of the 1994-1995 school year; according to the teacher, such behavior was documented to have occurred at least 28 times during the school year.[1] According to the Orange Grove faculty, this behavior has almost disappeared completely since the use of communication pictures and occupational therapy were implemented at Orange Grove. Dr. Marcus and Dr. Wigley agreed that the cause of this behavior could have

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[1] The parent contends the self-abusive behavior occurred daily from October of 1994 through the end of the school year.

very well been the frustration experienced by the student over her continuing failures to communicate in the school environment.

I have examined the proposed IEP for the 1995-1996 school year as proposed by the local board's placement committee. It is noted that despite all of the foregoing recommendations, there was no plan in place in June of 1995 for extended year services, other than some discussion of providing a limited amount of six weeks of speech and language therapy during the summer. In addition, the committee did not discuss any specific recommendations for the inclusion of occupational therapy services, but, simply stated that an OT evaluation would be performed. Finally, there was no meaningful discussion at the 1995-1996 IEP meeting as to specific ways that the school system would attempt to ameliorate the student's self-abusive behavior, and there was no written behavior management plan in place before the student was placed at Orange Grove.

For the foregoing reasons, I find and conclude that the WCSD failed to deliver to this student an appropriate degree of special education services during the 1994-1995 school year. I further find that the IEP proposed by the local board for the 1995-1996 school year does not meet the dictates of *Rowley* and does not rise to the level of providing services which could deliver meaningful educational progress to this student. I further find that Orange Grove is offering to the student increased levels of speech and language therapy, occupational therapy, and a strict behavior management plan, at a level not provided by the WCSD and which constitutes an appropriate and meaningful educational plan. As a result of the increased speech and language services, occupational therapy, and the behavior management plan, I find and conclude that Orange Grove Center was the least restrictive environment for the student for the 1995-1996 school year and that the parents were justified in unilaterally placing the student in this environment for said time period.

I understand and recognize that Orange Grove Center is an institution which serves disabled persons, and thus, the student's opportunities to interact with non-disabled peers are extremely limited. I find and conclude further, however, that the student's need for the services offered by Orange Grove currently outweigh her need to interact in the school environment with non-disabled peers, but it should be the goal of all parties involved to ultimately place the student back into the public school system when her communication and socialization skills have improved to the extent that such a placement is appropriate, where she can then again interact with her non-disabled peers. It should also be noted that with regard to the issue of least restrictive environment, that the student is not a residential student at Orange Grove and she has the opportunity to interact with her sister, and other non-disabled friends after school and on weekends.

Finally, I have reached this decision that the school system should reimburse the parents for the cost of the 1995-1996 school year after examining the performance results on the various evaluations, from which I cannot conclude that the student has made adequate educational progress in the WCSD. Although it can be argued that small gains were made in some areas based upon the results of the testing, generally speaking, I find that the student continued to function cognitively at approximately the 19 month level in 1994 and 1995, just as she did in 1991 and 1992. Using the test created by the *JSK* court, *supra*, the educational progress made by the student in the WCSD must be described as "trivial" and, hence, not in accordance with *Rowley*.

The school system has obviously made an effort to accommodate some of the parents' desires for the student's education. Although the student's teacher was diligent in her efforts, her lack of training and experience in autism caused her to be less than legally effective in dealing with a student with the degree of impairment in this case. The fact remains,

however, that the student was not appropriately educated during her tenure in the public school system, and the record reflects that she is being appropriately educated, at least for the time being, at the Orange Grove Center.

The parents have also asked for reimbursement for the 1996-1997 school year. According to documents in the record, the school system offered to prepare an IEP for the 1996-1997 school year, which offer was rejected by the parents. Since I cannot ascertain what program would have been offered by the school system for the 1996-1997 school year, I decline to award any reimbursement for the current school year.

The parents are entitled to reimbursement from the WCSD for the 1995-1996 school year in an amount of $62.65 per school day, and for the parents' mileage of 78 miles at the rate of $.25 per mile. The parents' attorney is herewith instructed to provide to the WCSD an invoice reflecting the cost of the program and the travel cost as awarded herein within 30 days of the date of filing this order with the Office of State Administrative Hearings.

So ordered this 10th day of February, 1997.

OFFICE OF STATE ADMINISTRATIVE HEARINGS

/s/ John R. Shaw, Jr.

JOHN R. SHAW, JR.

Special Assistant Administrative Law Judge

One Culver Center
245 Crogan Street, NW
Lawrenceville, Georgia 30245
(770) 963-8644

APPELLATE RIGHTS

The effective date of the final order in this case is the date on which it is received and filed by the Office of State Administrative Hearings. Any party aggrieved by this order may appeal in the United States District Court or the local county superior court. "Stay Put" provisions do not go into effect unless an appeal is filed.

Your appellate rights are stated in 20 U.S.C. 1415(e). Although no time limit is specified in the statute, most appeals in other types of cases must be filed within thirty days of the date the decision is filed with OSAH, and a prudent person may choose to file an appeal not later than thirty days from such date.

APPENDIX D

[Filed Jul. 29, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION FILE NO. 4:97-CV-0054-HLM

WALKER COUNTY SCHOOL DISTRICT, JEWEL CAMPBELL, CHARLES HELTON, MACK HUNT, MARGARET JOHNSON, and SANDRA MCKINLEY, as members of the Walker County Board of Education, and WALKER COUNTY BOARD OF EDUCATION,

Plaintiffs,

v.

JENSINE B., a minor, by and through her parents and legal guardians, JOHN BENNETT and DENISE BENNETT,

Defendants.

ORDER

This is an Individuals With Disabilities in Education Act case, in which both Plaintiffs and Defendants appeal from an administrative hearing officer's decision. The case is before the Court on Plaintiffs' Motion to Exceed Page Limit [35], Plaintiffs' Motion for Consideration of Additional Evidence [36], Defendants' Motion Under Local Rule 7.1 to Exceed the Page Limitation on Their Brief on Final Judgment [39] and Plaintiffs' Motion to Modify Scheduling Order and Stay Response to Defendants' Renewed Motion for Final Judgment [40].[1]

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[1] The Court grants Plaintiffs' Motion to Exceed Page Limit and Defendants' Motion Under Local Rule 7.1 to Exceed the Page Limitation

I. Background

A. Legal Background

The Individuals With Disabilities in Education Act ("IDEA"), formerly known as the Education for All Handicapped Act ("ERA"), *codified at* 20 U.S.C.A. § 1400 *et seq.*, provides federal funds to State and local agencies for the education of disabled children. As a condition of receiving these funds, State and local agencies must implement the substantive and procedural requirements of the IDEA. §§ 1411, 1412. The IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." § 1400(c). To satisfy its duty to provide a free, appropriate public education, a school system must provide " 'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.' " *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990) (quoting *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982)).

To satisfy the "personal instruction" requirement of the IDEA, State and local education agencies must provide each disabled child with an individualized education program ("IEP") tailored to the needs of the particular child. 20 U.S.C.A. § 1414(a)(5); *Doe*, 915 F.2d at 654. The IEP "is developed as a written statement for each child in a meeting between the teacher, [the] parents or guardian, and local educational agency representatives." *Doe*, 915 F.2d at 654; § 1401(a)(19). The IEP must contain statements detailing: (1) the child's present educational performance level; (2) annual

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on Their Brief on Final Judgment. The Court also orders the parties to comply with Local Rule 7.1's requirements concerning type limitations for all future briefs. *See* L.R. N.D.Ga. 7.1D.

goals, including short-term instructional objectives, for the child; (3) specific educational services to be provided; (4) needed transition services; (5) the projected initiation dates and anticipated duration of services; and (6) objective criteria and evaluation procedures for assessing achievement of instructional objectives. § 1401(a)(19). Each IEP must be reviewed annually by the State or local educational agency, and the State or local educational agency must notify parents of any changes in the child's evaluation or placement. *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 929 (11th Cir. 1989); § 1415(b)(1)(C).

The IDEA also provides procedural safeguards for parents, children, and state or local educational agencies. First, parents and children may present "complaints with respect to any matter relating to the identification, evaluation, or education of the child, or the provision of a free appropriate public education to such child." § 1415(b)(1)(E). Second, parents are entitled to prior written notice "whenever an educational agency proposes or refuses to initiate a change in the evaluation or educational placement of their child or the provision of a free appropriate public education to the handicapped child." *Doe*, 915 F.2d at 655; § 1415(b)(1)(C). Third, parents or guardians who are dissatisfied with the educational program offered may request an impartial due process hearing to be conducted by an administrative hearing officer. § 1415(b)(2) & (c). Fourth, a party who is dissatisfied with the decision issued by the administrative hearing officer may seek judicial review of the administrative hearing officer's decision by filing a civil action in federal district court or in a State court of competent jurisdiction. § 1415(e)(2).

Section 1415(e)(2) governs the Court's review of decisions of administrative hearing officers, and provides:

> the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request

> of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

§ 1415(e)(2).

B. Factual Background

Defendant Jensine B. ("Jensine") is an eight-year-old student whose parents, Defendants John and Denise Bennett, reside in Walker County, Georgia. (Compl. ¶ 5; Ans. and Cross-Compl. ¶ 33; Defs.' Resp. to Mand. Discl. ¶ 3; Pls.' Resp. to Mand. Discl. ¶ 1.) Jensine is autistic, and first was diagnosed as having "autistic-like" behaviors at the age of three. (Compl. ¶¶ 5,6; Defs.' Resp. to Mand. Discl. ¶ 3.)

In October 1991, Plaintiff Walker County School District ("WCSD") conducted a pre-placement evaluation of Jensine and determined that Jensine was eligible to receive special education services pursuant to IDEA. (Compl. ¶ 6; Compl. Corrected Ex. A at 2.) Plaintiff WCSD prepared an IEP for Jensine for the 1991-92 year that provided Jensine with preschool special education services. (Compl. ¶ 6; Compl. Corrected Ex. A at 2.) Jensine enrolled as a student in the WCSD pursuant to the terms of the 1991-92 IEP. (Compl. Corrected Ex. A at 1-2.)

Jensine remained enrolled as a student in the WCSD during the 1992-93, 1993-94, and 1994-95 school years. (Compl. ¶ 7; Compl. Corrected Ex. A at 1.) During each of those years, Jensine received special education services in accordance with her IEPs. (Compl. ¶ 7.)

During the spring of 1995, Plaintiff WCSD prepared an IEP for the 1995-96 school year. (Compl. ¶ 12; Compl. Corrected Ex. A at 5-6; Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3.) The 1995-96 IEP offered to provide to Jensine a five-week summer program at her regular elementary school. (Compl. ¶ 12; Compl. Corrected

Ex. A at 5-6; Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3.) Defendants, however, rejected the proposed summer program. (Compl. ¶ 12; Compl. Corrected Ex. A at 5-6; Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3.)

On August 18, 1995, Plaintiff WCSD held a second IEP meeting to prepare an IEP for the 1995-96 school year. (Compl. ¶ 13; Compl. Corrected Ex. A at 6; Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3.) Defendants rejected the IEP for the 1995-96 school year proposed by Plaintiff WCSD. (Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3.)

Defendants unilaterally removed Jensine from the WCSD in the summer of 1995, and enrolled her in the Orange Grove Center, a private facility located in Chattanooga, Tennessee. (Ans. and Cross-Compl. ¶ 35; Defs.' Resp. to Mand. Discl. ¶ 3; Pls.' Resp. to Mand. Discl. ¶ 1, Compl. ¶ 14; Compl. Corrected Ex. A at 1,6.) Jensine remained enrolled as a student at the Orange Grove Center from August 1995 until March 1997. (Compl. ¶ 17.)

In July 1996, Defendants requested a due process hearing to contest the validity of the programs offered by Plaintiff WCSD for the 1995-96 school year and for the following years. (Defs.' Resp. to Mand. Discl. ¶ 3; Pls.' Resp. to Mand. Discl. ¶ 1; Compl. ¶ 18.) In August 1996, after receiving notice of Defendants' request for a due process hearing, Plaintiff WCSD offered to convene another IEP meeting for Jensine. (Ans. and Cross-Compl. ¶ 36; Defs.' Resp. to Mand. Discl. ¶ 3.) Defendants declined the offer. (Ans. and Cross-Compl. ¶ 36; Defs.' Resp. to Mand. Discl. ¶ 3.)

Soon thereafter, an administrative hearing officer held a due process hearing, and issued a decision on February 10, 1997. (Compl. Corrected Ex. A.) The administrative hearing officer concluded that Plaintiffs had failed to provide Jensine

with an appropriate, free public education for the 1995-96 school year. (*Id.* at 12, 21-22.) Accordingly, the administrative hearing officer ordered Plaintiffs to reimburse Defendants for the costs associated with Jensine's education during the 1995-96 school year. (*Id.* at 22-24.) The administrative hearing officer declined to award Defendants the costs associated with Jensine's education during the 1996-97 school year, because no IEP had been completed for Jensine for the 1996-97 school year. (*Id.* at 23.)

On March 12, 1997, Plaintiffs initiated the instant action. Plaintiffs appeal from the decision of the administrative hearing officer awarding reimbursement to Defendants for the costs associated with Jensine's education during the 1995-96 school year. (Compl. ¶¶ 26-31.) Defendants assert a Cross-Complaint against Plaintiffs, alleging that the administrative hearing officer erred in declining to award reimbursement to Defendants for the costs associated with Jensine's education during the 1996-97 school year. (Ans. and Cross-Compl. ¶ 41.)

C. Procedural Background

On July 7, 1997, Plaintiffs filed their first Motion to Submit Additional Evidence. On January 29, 1998, the Court entered an Order denying Plaintiffs' first Motion as premature because Plaintiffs had failed to provide the Court with a description of the additional evidence Plaintiffs wished the Court to consider. (Order of Jan. 29, 1998, at 14-15.)

On May 22, 1998, the Court held a teleconference in this case to address scheduling issues. The Court entered a written Order memorializing the actions taken during the May 22, 1998, teleconference. (Order of May 22, 1998.) Pursuant to the May 22, 1998, Order, Plaintiffs filed the instant Motion for Consideration of Additional Evidence.

II. Discussion

A. Standard Governing Admission of Additional Evidence

Plaintiffs request the Court to enter an order providing that the Court will consider the additional evidence when reviewing the decision of the administrative hearing officer. Specifically, Plaintiffs offer the following additional evidence: (1) the testimony of Dr. Lee Marcus, who testified as an expert witness for Plaintiffs at the administrative hearing; (2) the testimony of Dr. B.J. Freeman, an expert in the field of autism; (3) the testimony of Judi Bailey, who observed and evaluated Jensine's classroom in May 1992 and provided instruction related to TEACCH techniques[2] to Jensine's classroom teacher and speech and language therapist in August 1995; (4) Orange Grove Center educational records; (5) deposition testimony of Defendant Denise Bennett, who testified at the administrative hearing; (6) deposition testimony of Defendant John Bennett; (7) deposition testimony of Lee Ann Shelton, who served as Jensine's classroom teacher at the Orange Grove Center from December 1996 to April 1997; (8) deposition testimony of Reba Smith, a training specialist and former classroom teacher at the Orange Grove Center who testified at the administrative hearing; (9) testimony of Debbie Sneed, who served as Jensine's classroom teacher at the Orange Grove Center from August 1995 to December 1996, and who testified at the administrative hearing; (10) testimony of consultants Nona Lindbergh and Sharon Butler, who evaluated Jensine's classroom in the WCSD; (11) the

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[2] TEACCH is an acronym for Treatment and Education of Autistic and Related Communication Handicapped Children. (Admin. Hearing Tr. at 272.) TEACCH is an internationally recognized comprehensive program of diagnostic and treatment methodologies for developmentally disabled children and adults. (*Id.* at 273.)

testimony of Dr. Ronald Wigley, who served as Jensine's treating psychologist and who testified as an expert witness for Defendants at the administrative hearing; (12) the testimony of Dana Driggers, who observed and evaluated Jensine's classroom in the WCSD in January 1995; (13) the affidavit testimony of Kaye Cannon, who served as Jensine's pre-school classroom teacher during the 1991-92 school year; (14) the testimony of Glenda Evans, a speech and language pathologist who observed Jensine's classroom in the WCSD in December 1992 and evaluated the speech and language services then provided to Jensine; (15) tapes of IEP meetings; (16) Defendant Denise Bennett's notes of meetings with WCSD officials; (17) the testimony of Iris Chapman, who serves as the director of special education services in Hamilton County, Tennessee; (18) the testimony of Dr. Janice Wheeler, who signed a report of an evaluation of Jensine that was performed in September 1995; (19) the testimony of Debbie Morgan, who served as Jensine's classroom teacher in the WCSD for the 1994-95 school year and who testified at the administrative hearing; (20) the testimony of Sallie Lesperance, who served as Jensine's classroom teacher in the WCSD for the 1992-93 and 1993-94 school years; and (21) the testimony of Missy Drennan, who served as Ms. Lesperance's classroom aide during the 1992-93 and 1993-94 school years.

Section 1415(e)(2) of the IDEA governs the scope of the Court's review of a decision by an administrative hearing officer, and provides:

> In any action . . . the court shall receive the records of the administrative proceedings, *shall hear additional evidence at the request of a party*, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C.A. § 1415(e)(2) (emphasis added). The Court has discretion whether to admit evidence in addition to the records of the administrative proceedings. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 791 (1st Cir. 1984), *aff'd sub nom. on other grounds, School Comm. of Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985).

When deciding whether to admit evidence pursuant to § 1415(e)(2), the Court first must "evaluate a party's proffered evidence before deciding to exclude it." *Susan N.*, 70 F.3d at 759. With respect to the instant Motion, the Court observes that Plaintiffs have offered for admission the testimony of twenty witnesses, many of whom either testified at the administrative hearing, were available to testify at the administrative hearing, or will offer testimony on issues already addressed by witnesses at the administrative hearing.

The Eleventh Circuit has not yet expressed an opinion as to the proper meaning to be given the phrase "additional evidence," and a difference in opinion exists among the other circuit courts. The First, Seventh, and Ninth Circuits have adopted restrictive definitions of the word "additional," and have construed the term to mean "supplemental." *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993); *Town of Burlington*, 736 F.2d at 790. By interpreting the word "additional" in this manner, these circuits take the position that the IDEA:

> contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of

> evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

Town of Burlington, 736 F.2d at 790. Such an interpretation greatly restricts the additional evidence that the district court may consider when reviewing an administrative hearing officer's decision.

The Sixth Circuit, however, has repudiated the idea that "additional evidence is admissible only in limited circumstances, such as to supplement or fill in the gaps in the evidence previously introduced." *See Metropolitan Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990). Instead, the Sixth Circuit construes the term "additional" in the following manner:

> "Additional," in its ordinary usage, implies something that is added, or something that exists by way of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add."

Id. at 234. The Sixth Circuit's interpretation of the term "additional" thus permits the district court to consider not only evidence that fills in gaps contained in the administrative record, but also any other evidence that is relevant to the proceedings. *Id.*

In the January 29, 1998, Order, the Court noted that it found the Sixth Circuit's interpretation of the term "additional evidence" to be persuasive, and was inclined to apply that interpretation when reviewing future motions for the admission of additional evidence. (Order of Jan. 29, 1998, at 14-15.) After further reflection, however, the Court clarifies its position to emphasize that the Court does not believe that

the broader interpretation of the term "additional" adopted by the Sixth Circuit entitles a party to an unlimited opportunity to introduce additional evidence on review of the administrative hearing officer's decision. Such an interpretation effectively would permit parties seeking a review of an administrative hearing officer's decision to obtain a trial *de novo* in the district court. The Court cannot interpret the Sixth Circuit's action in adopting a relaxed definition of the term "additional" as intending such a result. Indeed, the Sixth Circuit, in adopting a relaxed definition of the term "additional," did not reject the basic cautions recognized in *Town of Burlington*:

> "The determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character [of] the hearing from one of review to a trial de novo. . . . In ruling on motions for witnesses to testify, a court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources."

Cook, 915 F.2d at 235 (quoting *Town of Burlington*, 736 F.3d at 790-91) (footnote omitted). The Court therefore believes that, although the Sixth Circuit rejected the strict interpretation of the term "additional" adopted by the First Circuit in *Town of Burlington*, the standard for consideration of additional evidence employed by the Sixth Circuit still permits consideration of additional evidence only in limited circumstances. Accordingly, the Court will employ the broader definition of "additional" employed by the Sixth Circuit, as well as the basic cautions recognized in *Town of Burlington*, when evaluating Plaintiffs' Motion.

B. Plaintiffs' Motion to Submit Additional Evidence

The Court first expresses its concern that Plaintiffs have construed the January 29, 1998, Order's discussion of the standard for consideration of additional evidence as permission to seek, in effect, a trial *de novo*. Plaintiffs have requested the Court to consider testimony from twenty witnesses, many of whom: (1) previously testified at the administrative hearing; (2) did not testify at the administrative hearing, but were available to testify at the administrative hearing; or (3) will offer testimony that is identical to testimony previously offered by other witnesses at the administrative hearing. The Court nonetheless proceeds to analyze each source of additional evidence proffered by Plaintiffs in light of the standard discussed *supra* Part II.A.

1. Testimony of Dr. Lee Marcus

Plaintiffs seek to introduce additional testimony from Dr. Lee Marcus, who previously testified as an expert witness for Plaintiffs at the administrative hearing. Plaintiffs argue that the Court should "see and hear Dr. Marcus testimony for itself" because the administrative hearing officer did not find Dr. Marcus' testimony to be credible. Plaintiffs also show that Dr. Marcus will provide the following testimony: (1) testimony that Jensine made no greater rate of educational, developmental, or cognitive progress at the Orange Grove Center; (2) testimony discussing Dr. Marcus' review of the IEP proposed by Plaintiffs for the 1995-96 school year and Dr. Marcus' opinion that the 1995-96 IEP met Jensine's needs; (3) testimony discussing Jensine's behavior, its etiology, and the impact of Jensine's companion diagnosis; (4) testimony stating that, even in the absence of a formal behavioral management plan, Jensine's teachers in the WCSD addressed her behavioral needs appropriately; (5) testimony that, in Dr. Marcus' opinion, occupational therapy services were not a necessary component of Jensine's educational

program in the WCSD; (6) testimony that, in Dr. Marcus' opinion, the Orange Grove Center was not the least restrictive alternative for Jensine; (7) testimony relating to Dr. Marcus' concerns about the Orange Grove Center's student population; and (8) testimony relating to Dr. Marcus' opinion about the six-week program offered by Plaintiffs in the summer of 1995.

The Court believes that the proffered testimony of Dr. Marcus fails to satisfy even the less restrictive standard for consideration of "additional" evidence set forth *supra* Part II.A. The additional testimony of Dr. Marcus proffered by Plaintiffs would be repetitive, as Dr. Marcus already has offered the same testimony at the administrative hearing. (*See* Admin. Hearing Tr. at 270-375.) The Court believes that permitting Dr. Marcus to testify as to the same issues a second time would undercut the statutory role of the administrative hearing, would waste judicial resources, and effectively would transform the nature of the proceeding in this Court from a limited review proceeding to a trial *de novo*. To the extent that Plaintiffs are concerned about the administrative hearing officer's determination as to Dr. Marcus' credibility, the Court assures Plaintiffs that the Court has before it the transcript of Dr. Marcus' testimony presented at the administrative hearing, and is quite capable of making its own determination as to Dr. Marcus' credibility.

2. Testimony of Dr. B.J. Freeman

Plaintiffs proffer for the Court's consideration the expert testimony of Dr. B.J. Freeman. Plaintiffs show that Dr. Freeman will offer the following testimony: (1) testimony relating to autism, including the characteristics of children with autism, the behavior of autistic children, and the challenges presented to educators by autistic students; (2) testimony concerning the services provided to Jensine by

Plaintiffs during the 1994-95 school year; (3) testimony concerning Dr. Freeman's review of the IEP proposed by Plaintiffs for the 1995-96 school year and Dr. Freeman's opinion as to the appropriateness of that IEP for Jensine's needs; (4) testimony expressing Dr. Freeman's opinion that Jensine's rate of cognitive development remained consistent throughout her educational career; (5) testimony expressing Dr. Freeman's opinion that, even in the absence of a formal behavioral management plan, Jensine's teachers in the WCSD appropriately addressed her behavioral needs; (6) testimony expressing Dr. Freeman's opinion that occupational therapy services were not a necessary component of Jensine's educational program in the WCSD; (7) testimony concerning Dr. Freeman's opinion that Plaintiffs were capable of providing the same services to Jensine that the Orange Grove Center provided; (8) testimony stating that the Orange Grove Center was not the least restrictive environment for Jensine; and (9) testimony contrasting Jensine's placement in the WCSD with the setting at the Orange Grove Center.

The Court believes that Dr. Freeman's testimony fails to satisfy the Sixth Circuit's standard for the consideration of additional evidence discussed *supra* Part II.A. First, permitting Dr. Freeman to testify would undercut the statutory role of the administrative hearing, would waste judicial resources, and would convert the nature of the limited review proceeding in this Court to that of a trial *de novo*. Second, permitting Dr. Freeman to testify despite the absence of any showing by Plaintiffs that Dr. Freeman was unavailable to testify at the administrative hearing effectively would permit Plaintiffs to reserve their best evidence for trial. Third, Dr. Freeman's testimony is cumulative of testimony previously presented at the administrative hearing. At the administrative hearing, Dr. Marcus testified for Plaintiffs concerning: (1) autism and the general characteristics and behavior of autistic children (Admin. Hearing Tr. at 279-80, 297-304, 308-10,

318, 340, 344); (2) the 1995-96 IEP proposed by Plaintiffs (*id.* at 374-75); (3) the rate of Jensine's progress (*id.* at 290-306) ; (4) Jensine's behavioral needs (*id.* at 344-49); (5) whether Plaintiffs are capable of providing the same services to Jensine as the Orange Grove Center provided (*id.* at 316, 364-68); (6) Jensine's need for occupational therapy services (*id.* at 322-24) ; and (7) the inappropriateness of a segregated setting for Jensine (*id.* at 312-21, 353-56, 363-65). Additionally, Debbie Moran provided testimony at the administrative hearing relating to the services the WCSD provided to Jensine during the 1994-95 school year. (*Id.* at 27-38, 45, 56-57, 60-64, 378-87, 395-402.)

3. Testimony of Judi Bailey

Plaintiffs next proffer the expert testimony of Judi Bailey, who serves as the Associate Director for Professional Support Services at Team Evaluation Center, Inc., in Chattanooga, Tennessee. Ms. Bailey served as Behavior Management Training Specialist at the Orange Grove Center from August 1988 to August 1995. Plaintiffs show that Ms. Bailey will offer the following testimony: (1) testimony concerning the results of an educational assessment performed by Ms. Bailey in May 1992; (2) testimony concerning Ms. Bailey's opinion that Jensine's classroom teacher in the WCSD, Debbie Morgan, had the necessary skills to teach Jensine during the 1995-96 school year and did not require further consultation with or supervision by the Orange Grove Center's staff; (3) testimony expressing Ms. Bailey's opinion that Jensine's current classroom placement in the WCSD provides Jensine with appropriate educational services; (4) testimony concerning Ms. Bailey's review of the IEP proposed by Plaintiffs for the 1995-96 school year and her opinion that the IEP adequately addressed Jensine's needs; and (5) testimony with respect to the Administrative Law Judge's conclusion that the Orange Grove Center was a "proper placement" for Jensine during the 1995-96 school year.

The Court believes that the proffered testimony of Ms. Bailey fails to satisfy the standard for admitting additional evidence set forth *supra* Part II.A. First, permitting Ms. Bailey to testify at this stage of the proceedings would undercut the statutory role of the administrative hearing, would waste judicial resources, and would convert the nature of the limited review proceeding in this Court to that of a trial *de novo*. Second, permitting Ms. Bailey to testify despite any showing by Plaintiffs that Ms. Bailey was unavailable to testify at the administrative hearing effectively would permit Plaintiffs to reserve their best evidence for trial. Third, Ms. Bailey's testimony is cumulative of testimony previously presented at the administrative hearing. (*See* Admin. Hearing Tr. at 151-52, 270-375.) Fourth, to the extent that Plaintiffs seek to have Ms. Bailey testify as to the appropriateness of Jensine's current placement within the WCSD, Plaintiffs have failed to establish why such testimony is relevant to the issues before the Court.

4. Orange Grove Documents

Plaintiffs seek to introduce additional evidence consisting of records from the Orange Grove Center produced during the period from December 1996 to April 11, 1997. The Court notes that Plaintiffs have failed to outline the content of the documents with sufficient specificity to permit the Court to determine whether the Court should consider this additional evidence. The Court therefore will not consider the additional records.

5. Deposition Testimony of Defendant Denise Bennett

Plaintiffs request that the Court consider the deposition testimony of Defendant Denise Bennett. Specifically, Plaintiffs state that Plaintiffs wish to introduce the following deposition testimony: (1) testimony about the first manifestations of Jensine's behaviors and the recurrence of

the behaviors; (2) testimony about Ms. Bennett's discussions with WCSD staff and administrators concerning summer services; (3) testimony concerning Ms. Bennett's discussions with WCSD staff and administrators relating to occupational therapy services; and (4) testimony concerning the time frame in which various decisions were made with respect to Jensine's educational placement and the basis for those decisions.

The Court believes that the proffered testimony of Defendant Denise Bennett fails to satisfy the standard for consideration of additional evidence discussed *supra* Part II.A. The additional testimony of Defendant Denise Bennett proffered by Plaintiffs would be repetitive, as Defendant Denise Bennett already has offered testimony concerning these same issues at the administrative hearing. (*See* Admin. Hearing Tr. at 117-92.) Permitting Plaintiffs to introduce the deposition testimony of Defendant Denise Bennett would undercut the statutory role of the administrative proceedings, and would result in the unnecessary expenditure of judicial resources.

6. Deposition Testimony of Defendant John Bennett

Plaintiffs seek to introduce the deposition testimony of Defendant John Bennett. Plaintiffs show that Defendant John Bennett's deposition testimony relates to Defendant John Bennett's objections to the IEP proposed by Plaintiffs for the 1995-96 school year and to Defendant John Bennett's observations of Jensine's behavior at home during the periods relevant to this litigation.

The Court believes that the proffered testimony of Defendant John Bennett fails to satisfy the standard for considering additional evidence set forth *supra* Part II.A. First, the deposition testimony of Defendant John Bennett that Plaintiffs seek to introduce is cumulative of the testimony presented by Defendant Denise Bennett during the admin-

istrative hearing. (*See* Admin. Hearing Tr. at 117-92.) Introducing this evidence thus would expend judicial resources unnecessarily. Second, the Court believes that permitting Plaintiffs to proffer the deposition testimony of Defendant John Bennett unfairly permits Plaintiffs to reserve their best evidence for trial, and to convert this proceeding from one of limited review to a trial *de novo*. Defendant John Bennett attended the administrative hearing and was available to testify, yet Plaintiffs chose not to call Defendant John Bennett as a witness. Plaintiffs offer no explanation for this decision in their brief in support of their Motion. Under these circumstances, the Court will not permit Plaintiffs to introduce the deposition testimony of Defendant John Bennett.

7. Deposition Testimony of Lee Ann Shelton

Plaintiffs seek permission to introduce portions of the deposition testimony of Lee Ann Shelton, who served as Jensine's classroom teacher at the Orange Grove Center from December 1996 to April 1997. Plaintiffs show that Ms. Shelton will present testimony concerning the application of the TEACCH method in her class and Jensine's behaviors during that period.

To the extent that Plaintiffs seek to introduce testimony concerning the application of the TEACCH method, the Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence discussed *supra* Part II.A. Several witnesses testified at the administrative hearing about the TEACCH method and its application. (*See* Admin. Hearing Tr. at 211-12, 218-19, 229, 247-48, 254, 279-80, 316-21, 337-43, 347-50.) The deposition testimony of Ms. Shelton on this issue therefore is cumulative.

To the extent that Plaintiffs seek to introduce Ms. Shelton's deposition testimony concerning Jensine's progress at the

Orange Grove Center after the date of the administrative hearing, the Court believes this testimony satisfies the standard for consideration of additional evidence set forth *supra* Part II.A. Plaintiffs therefore may introduce the deposition testimony of Ms. Shelton only for this limited purpose.

8. Deposition Testimony of Reba Smith

Plaintiffs next proffer the deposition testimony of Reba Smith, a training specialist and former classroom teacher at the Orange Grove Center who testified at the administrative hearing. Plaintiffs seek to introduce the deposition testimony of Ms. Smith relating to the application of TEACCH techniques in the classroom.

The Court believes that the proffered testimony of Ms. Smith fails to satisfy the standard for consideration of additional evidence set forth *supra* Part II.A. First, the additional testimony of Ms. Smith proffered by Plaintiffs would be repetitive, as Ms. Smith already has offered testimony concerning these same issues at the administrative hearing. (*See* Admin. Hearing Tr. at 243-55.) Second, permitting Plaintiffs to introduce the deposition testimony of Ms. Smith would undercut the statutory role of the administrative proceedings, would result in the unnecessary expenditure of judicial resources, and effectively would convert this proceeding into a trial *de novo*.

9. Deposition Testimony of Debbie Sneed

Plaintiffs seek to introduce the deposition testimony of Debbie Sneed, who served as Jensine's classroom teacher at the Orange Grove Center from August 1995 to December 1996. Ms. Sneed testified at the administrative hearing. Plaintiffs seek to introduce Ms. Sneed's deposition testimony relating to: (1) Ms. Sneed's description of the TEACCH techniques used in her classroom; (2) the nature of behavioral

issues present in autistic children; and (3) Jensine's behavior through December 1996.

The Court believes that the proffered testimony fails to satisfy the standard for consideration of additional evidence discussed *supra* Part II.A. The additional testimony of Ms. Sneed proffered by Plaintiffs would be repetitive, as Ms. Sneed already has offered testimony concerning these same issues at the administrative hearing. (*See* Admin. Hearing Tr. at 213-39.) Under these circumstances, permitting Plaintiffs to introduce the deposition testimony of Ms. Sneed would undercut the statutory role of the administrative proceedings, and would result in the unnecessary expenditure of judicial resources.

10. Testimony of Consultants Nona Lindbergh and Sharon Butler

Plaintiffs seek to introduce testimony from Nona Lindbergh and Sharon Butler, two consultants with Autism Services of Georgia who conducted an evaluation of Jensine's classroom in the WCSD in May 1995. Plaintiffs show that Ms. Lindbergh and Ms. Butler will testify as to their observations relating to the WCSD classroom.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence set forth *supra* Part II.A. Ms. Morgan, who served as Jensine's classroom teacher in the WCSD, testified at the administrative hearing about the May 1995 evaluation conducted by Ms. Lindberg and Ms. Butler and the observations made by Ms. Lindbergh and Ms. Butler. (*See* Admin. Hearing Tr. at 39-41.) The testimony of Ms. Lindbergh and Ms. Butler thus is cumulative. Permitting Plaintiffs to introduce this testimony therefore would undercut the statutory role of the administrative determination process and result in an unnecessary expenditure of judicial resources.

11. Deposition Testimony of Dr. Ronald Wigley

Plaintiffs next request the Court to consider the deposition testimony of Dr. Ronald Wigley, who testified as an expert witness on behalf of Defendants at the administrative hearing. Plaintiffs show that Dr. Wigley's deposition testimony relates to the following issues: (1) Dr. Wigley's experience with and knowledge of autistic children; (2) Dr. Wigley's expertise in formulating educational programs for autistic children; (3) recommendations made to Plaintiffs by Dr. Wigley concerning educational programs for Jensine; and (4) Dr. Wigley's contacts with WCSD officials.

The Court believes that the proffered testimony of Dr. Wigley fails to satisfy the standard for consideration of additional evidence discussed *supra* Part II.A. First, the additional testimony of Dr. Wigley proffered by Plaintiffs would be repetitive, as Dr. Wigley already has offered testimony concerning these same issues at the administrative hearing. (*See* Admin. Hearing Tr. at 76-117.) Second, permitting Plaintiffs to introduce the deposition testimony of Dr. Wigley would undercut the statutory role of the administrative proceedings, would result in the unnecessary expenditure of judicial resources, and effectively would convert the Court's role from that of providing a limited review of the administrative proceedings to that of conducting a trial *de novo*.

12. Testimony of Dana Driggers

Plaintiffs next proffer the testimony of Dana Driggers, who evaluated the communication systems present in Jensine's classroom in the WCSD in January 1995. Plaintiffs show that Ms. Driggers will testify that, in her opinion, the communication systems present in Jensine's classroom in the WCSD were appropriate for a child with Jensine's communication deficits.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence set forth *supra* Part II.A. Ms. Morgan, who served as Jensine's classroom teacher in the WCSD, testified at the administrative hearing about Ms. Driggers' evaluation of the classroom and her recommendation. (Admin. Hearing Tr. at 41-43.) The testimony of Ms. Driggers thus is cumulative. Permitting Plaintiffs to introduce this testimony therefore would undercut the statutory role of the administrative determination process and would result in an unnecessary expenditure of judicial resources. Additionally, permitting Plaintiffs to introduce testimony from Ms. Driggers at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Driggers as a witness at the administrative hearing.

13. The Affidavit Testimony of Kaye Cannon

Plaintiffs next seek to introduce the affidavit of Kaye Cannon, who served as Jensine's pre-school classroom teacher in the WCSD during the 1991-92 school year. Plaintiffs show that the affidavit contains Ms. Cannon's testimony concerning Jensine's self-abusive behavior during the 1991-92 school year.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence discussed *supra* Part II.A. Permitting Plaintiffs to introduce testimony from Ms. Cannon at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Cannon as a witness at the administrative hearing.

14. Testimony of Glenda Evans

Plaintiffs next seek to introduce the testimony of Glenda Evans, a speech and language pathologist from Emory

University who conducted an evaluation of the speech and language services provided to Jensine in her classroom in the WCSD during December 1992.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence set forth *supra* Part II.A. Permitting Plaintiffs to introduce testimony from Ms. Evans at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Evans as a witness at the administrative hearing. Additionally, to a great extent, the testimony of Ms. Evans is cumulative because her evaluation report already has been submitted by the parties into the administrative record. (R. at 130-34.) Permitting Ms. Evans to testify thus would undercut the statutory role of the administrative process and would result in the waste of judicial resources.

15. Tapes of IEP Meetings

Plaintiffs request the Court to consider audiotapes made of IEP meetings at which decisions concerning educational services to be provided to Jensine by Plaintiffs were discussed. The Court believes that Plaintiffs fail to satisfy the standard for consideration of additional evidence discussed *supra* Part II.A. The audiotapes of IEP meetings, to a great extent, are cumulative because minutes of the IEP meetings already have been placed into the administrative records. Permitting Plaintiffs to introduce the audiotapes of the meetings thus would undercut the statutory role of the administrative process and would result in the waste of judicial resources.

16. Defendant Denise Bennett's Notes of Meetings With WCSD Officials

Plaintiffs state that they may wish to address the admissibility of notes taken by Defendant Denise Bennett

during her meetings with WCSD Officials. Plaintiffs have not provided the Court with sufficient information to permit the Court to reach a determination as to whether the Court will consider the notes. At this time, therefore, the Court denies any request to consider the notes.

17. Testimony of Iris Chapman

Plaintiffs next request the Court to consider the testimony of Iris Chapman, who serves as the director of special education services in Hamilton County, Tennessee. Plaintiffs show that Ms. Chapman will testify that the Orange Grove Center is not the least restrictive environment for Jensine.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence discussed *supra* Part II.A. At least one witness testified at the administrative hearing that the Orange Grove Center was not the least restrictive environment for Jensine. (Admin. Hearing Tr. at 214-15, 364-65.) The testimony of Ms. Chapman thus is cumulative. Permitting Plaintiffs to introduce this testimony therefore would undercut the statutory role of the administrative determination process and result in an unnecessary expenditure of judicial resources. Additionally, permitting Plaintiffs to introduce testimony from Ms. Chapman at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Chapman as a witness at the administrative hearing.

18. Testimony of Dr. Janice Wheeler

Plaintiffs next proffer for the Court's consideration the testimony of Dr. Janice Wheeler, a psychologist who signed a report of an evaluation of Jensine performed in September 1995. Plaintiffs state that Dr. Wheeler will testify about the impact of dual diagnoses of autism and mental retardation on a child's ability to progress in educational programs, and

about the reasons that autistic children may have tantrums and exhibit self-abusive behavior.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence set forth *supra* Part II.A. At least one witness testified at the administrative hearing about these issues. (Admin. Hearing Tr. at 297-301, 318-20.) The testimony of Dr. Wheeler thus is cumulative. Permitting Plaintiffs to introduce this testimony therefore would undercut the statutory role of the administrative determination process and result in an unnecessary expenditure of judicial resources. Additionally, permitting Plaintiffs to introduce testimony from Dr. Wheeler at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Dr. Wheeler as a witness at the administrative hearing. Finally, the Court believes that permitting Plaintiffs to introduce the testimony of Dr. Wheeler at this stage of the litigation runs the risk of converting this review proceeding into a proceeding resembling a trial *de novo*.

19. Testimony of Debbie Morgan

Plaintiffs next seek to introduce the testimony of Debbie Morgan, who served as Jensine's classroom teacher in the WCSD during the 1994-95 school year. Ms. Morgan testified at the administrative hearing. Plaintiffs state that Ms. Morgan will offer the following testimony: (1) testimony about Jensine's progress during the 1994-95 school year and behaviors exhibited by Jensine during that period; (2) testimony about training Ms. Morgan received at the Orange Grove Center in August 1995; (3) testimony concerning changes Ms. Morgan made to her classroom in the WCSD for the 1995-96 school year; (4) testimony concerning implementation of the recommendations of outside evaluators by the WCSD; (6) testimony about the teaching and behavior management methods Ms. Morgan used in her classroom in

the WCSD; and (7) testimony about the goals and objectives of the IEP proposed by Plaintiffs for the 1995-96 school year and their relation to Jensine's needs.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence discussed *supra* Part II.A. Ms. Morgan provided testimony as to most of these issues testified at the' administrative hearing. (*See* Admin. Hearing Tr. at 19-76, 376-402.) The proffered testimony of Ms. Morgan thus is cumulative, and permitting Plaintiffs to introduce this testimony would undercut the statutory role of the administrative determination process and result in an unnecessary expenditure of judicial resources. Additionally, permitting Plaintiffs to introduce testimony relating to issues not discussed by Ms. Morgan during her testimony at the administrative hearing at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to question Ms. Morgan about these issues during her testimony at the administrative hearing.

20. Sallie Lesperance

Plaintiffs seek to introduce the testimony of Sallie Lesperance, who served as Jensine's classroom teacher in the WCSD for the 1992-93 and 1993-94 school years. Plaintiffs argue that Ms. Lesperance will testify as to: (1) Jensine's progress during those school years; (2) the WCSD's implementation of the recommendations of outside evaluators; (3) teaching and behavior management methods utilized by the WCSD during those school years; and (4) the goals and objectives of the IEPs Plaintiffs prepared for Jensine for the 1992-93 and 1993-94 school years and how those goals and objectives addressed Jensine's needs.

The Court believes that Plaintiffs have failed to satisfy the standard governing consideration of additional evidence set

forth *supra* Part II.A. Ms. Morgan testified at the administrative hearing about the implementation of recommendations of outside evaluators. (*See* Admin. Hearing Tr. at 19-76, 376-402.) The testimony of Ms. Lesperance on this issue thus is cumulative, and allowing Plaintiffs to introduce this testimony would undercut the statutory role of the administrative determination process and would result in an unnecessary expenditure of judicial resources. With respect to the other issues to be discussed in Ms. Lesperance's testimony, permitting Plaintiffs to introduce testimony from Ms. Lesperance at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Lesperance as a witness at the administrative hearing. Permitting Plaintiffs to introduce testimony from Ms. Lesperance also raises concerns that such an action effectively converts this review proceeding into a trial *de novo*.

21. Testimony of Missy Drennan

Finally, Plaintiffs proffer the testimony of Missy Drennan, who served as a classroom aide to Ms. Lesperance during the 1992-93 and 1993-94 school years. Plaintiffs state that Ms. Drennan will offer testimony concerning: (1) Jensine's progress during those school years; (2) behavioral issues presented by Jensine; and (3) behavior management techniques used in Ms. Lesperance's classroom.

The Court believes that Plaintiffs have failed to satisfy the standard for consideration of additional evidence discussed *supra* Part II.A. Permitting Plaintiffs to introduce testimony from Ms. Drennan at this stage of the proceedings raises concerns about unfairness in allowing Plaintiffs to reserve their best evidence for trial, especially as Plaintiffs offer no explanation for failing to call Ms. Drennan as a witness at the administrative hearing.

22. Conclusion

In sum, the Court concludes that, for the most part, Plaintiffs have failed to satisfy the standard for consideration of additional evidence. The Court therefore will consider only the deposition testimony of Ms. Shelton relating to Jensine's progress at the Orange Grove Center after the time of the administrative hearing as additional evidence.

III. Plaintiffs' Motion to Modify Scheduling Order and Stay Response to Defendants' Renewed Motion for Final Judgment

Plaintiffs have requested that the Court stay the time period for Plaintiffs to respond to Defendants' Renewed Motion for Final Judgment until twenty days after the Court issues a ruling on Plaintiffs' Motion for Consideration of Additional Evidence. Because this Order resolves Plaintiffs' Motion for Consideration of Additional Evidence, Plaintiffs' request for a stay is moot. The Court therefore orders Plaintiffs to file their response to Defendants' Motion for Final Judgment within twenty days.

IV. Conclusion

ACCORDINGLY, the Court GRANTS Plaintiffs' Motion to Exceed Page Limit [35]. The Court GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion for Consideration of Additional Evidence [36], and will consider only the deposition testimony of Ms. Shelton relating to Jensine's progress at the Orange Grove Center after the date of the administrative hearing as additional evidence. The Court GRANTS Defendants' Motion Under Local Rule 7.1 to Exceed the Page Limitation on Their Brief on Final Judgment [39]. The Court DENIES AS MOOT Plaintiffs' Motion to Modify Scheduling Order and Stay Response to Defendants' Renewed Motion for Final Judgment [40], and ORDERS

Plaintiffs to file their response to Defendants' Renewed Motion for Final Judgment within twenty days.

IT IS SO ORDERED, this 29th of July, 1998.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed May 22, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION FILE NO. 4:97-CV-0054-HLM

WALKER COUNTY SCHOOL DISTRICT, JEWEL CAMPBELL, CHARLES HELTON, MACK HUNT, MARGARET JOHNSON, and SANDRA MCKINLEY, in their official capacities as Members of the Walker County Board of Education, and WALKER COUNTY BOARD OF EDUCATION,

Plaintiffs,

v.

JENSINE B., a minor, by and through her parents and legal guardians, JOHN BENNETT and DENISE BENNETT,

Defendants.

ORDER

This is an Individuals With Disabilities in Education Act case, in which both Plaintiffs and Defendants appeal from an administrative hearing officer's decision. The case came before the Court for a teleconference concerning the schedule for filing certain motions on May 22, 1998. This Order memorializes the actions taken by the Court during the May 22, 1998, teleconference.

For the reasons discussed during the May 22, 1998, teleconference, the Court sets forth the following schedule for filing motions. The Court ORDERS Plaintiffs to file, by June 15, a Motion for Consideration of Additional Evidence. In this Motion, Plaintiffs should outline their proposed additional evidence with sufficient specificity to permit

Defendants to file their anticipated Motion for Summary Judgment or other dispositive motion ("Defendants' Dispositive Motion"). The Court ORDERS Defendants to file their response to Plaintiffs' Motion for Consideration of Additional Evidence, as well as Defendants' Dispositive Motion, within 30 days after Plaintiffs file their Motion for Consideration of Additional Evidence. Plaintiffs then will have the period of time provided by the Local Rules to respond to Defendants' Dispositive Motion. The Court will rule on the Motions as promptly as possible after the Motions are submitted to the Court for ruling. The parties will have 15 days after the Court issues a ruling on the Motions to file their Consolidated Pretrial Order.

IT IS SO ORDERED, this the 22nd day of May, 1998.

/s/ Harold Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX F

[Filed Jan. 29, 1998]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION FILE NO. 4:97-CV-0054-HLM

WALKER COUNTY SCHOOL DISTRICT, JEWEL CAMPBELL, CHARLES HELTON, MACK HUNT, MARGARET JOHNSON, and SANDRA MCKINLEY, in their official capacities as Members of the Walker County Board of Education, and WALKER COUNTY BOARD OF EDUCATION,

Plaintiffs,

v.

JENSINE B., a minor, by and through her parents and legal guardians, JOHN BENNETT and DENISE BENNETT,

Defendants.

ORDER

This is an Individuals With Disabilities in Education Act case, in which both Plaintiffs and Defendants appeal from an administrative hearing officer's decision. The case is before the Court on Plaintiffs' Motion to Submit Additional Evidence [10], Plaintiffs' Motion for Summary Judgment as to Defendants' Cross-Complaint [11], Defendants' Motion for Protective Order [15], and Defendants' Motion for Final Judgment and Appropriate Relief on *De Novo* Review [20].

I. Background

A. Legal Background

The Individuals With Disabilities in Education Act ("IDEA"), formerly known as the Education for All Handi-

capped Act ("EHA"), *codified at* 20 U.S.CA. § 1400 *et seq.*, provides federal funds to State and local agencies for the education of disabled children. As a condition of receiving these funds, State and local agencies must implement the substantive and procedural requirements of the IDEA. §§ 1411, 1412. The IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." § 1400(c). To satisfy its duty to provide a free, appropriate public education, a school system must provide "'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990) (quoting *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176, 203 (1982)).

To satisfy the "personal instruction" requirement of the IDEA, State and local education agencies must provide each disabled child with an individualized education program ("IEP") tailored to the needs of the particular child. 20 U.S.C.A. § 1414(a)(5); *Doe*, 915 F.2d at 654. The IEP "is developed as a written statement for each child in a meeting between the teacher, [the] parents or guardian, and local educational agency representatives." *Doe*, 915 F.2d at 654; § 1401(a)(19). The IEP must contain statements detailing: (1) the child's present educational performance level; (2) annual goals, including short-term instructional objectives, for the child; (3) specific educational services to be provided; (4) needed transition services; (5) the projected initiation dates and anticipated duration of services; and (6) objective criteria and evaluation procedures for assessing achievement of instructional objectives. § 1401(a)(19). Each IEP must be reviewed annually by the State or local educational agency, and the State or local educational agency must notify parents of any changes in the child's evaluation or placement. *Drew*

P. v. Clarke County Sch. Dist., 877 F.2d 927, 929 (11th Cir. 1989); § 1415(b)(1)(C).

The IDEA also provides procedural safeguards for parents, children, and State or local educational agencies. First, parents and children may present "complaints with respect to any matter relating to the identification, evaluation, or education of the child, or the provision of a free appropriate public education to such child." § 1415(b)(1)(E). Second, parents are entitled to prior written notice "whenever an educational agency proposes or refuses to initiate a change in the evaluation or educational placement of their child or the provision of a free appropriate public education to the handicapped child." *Doe*, 915 F.2d at 655; § 1415(b)(1)(C). Third, parents or guardians who are dissatisfied with the educational program offered may request an impartial due process hearing to be conducted by an administrative hearing officer. § 1415(b)(2) & (c). Fourth, a party who is dissatisfied with the decision issued by the administrative hearing officer may seek judicial review of the administrative hearing officer's decision by filing a civil action in federal district court or in a State court of competent jurisdiction. § 1415(e)(2).

Section 1415(e)(2) governs the Court's review of decisions of administrative hearing officers, and provides:

> the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

§ 1415(e)(2).

B. Factual Background

Keeping in mind that, when deciding a motion for summary judgment, the Court "must view the evidence and

all factual inferences in the light most favorable to the party opposing the motion," the Court provides the following statement of facts. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465 (11th Cir. 1993). This statement does not represent actual findings of fact; rather, it is intended simply to place the Court's legal analysis within the context of a specific case or controversy. *Swint v. City of Wadley*, 5 F.3d 1435, 1439 (11th Cir. 1993) ("[W]hat we state as 'facts' in this [order] for purposes of reviewing the rulings on the summary judgment motion[ ] may not be the actual facts. They are, however, the facts for present purposes, and we set them out below.").

Defendant Jensine B. ("Jensine") is an eight-year-old student whose parents, Defendants John and Denise Bennett, reside in Walker County, Georgia. (Complaint ¶ 5; Answer and Cross-Complaint ¶ 33; Defendants' Resp. to Mand. Discl. ¶ 3; Plaintiffs' Resp. to Mand. Discl. ¶ 1.) Jensine is autistic, and first was diagnosed as having "autistic-like" behaviors at the age of three. (Complaint ¶¶ 5, 6; Defendants' Resp. to Mand. Discl. ¶ 3.)

In October 1991, Plaintiff Walker County School District ("WCSD") conducted a pre-placement evaluation of Jensine and determined that Jensine was eligible to receive special education services pursuant to IDEA. (Complaint ¶ 6; Complaint Corrected Ex. A at 2.) Plaintiff WCSD prepared an IEP for Jensine for the 1991-92 year that provided Jensine with preschool special education services. (Complaint ¶ 6; Complaint Corrected Ex. A at 2.) Jensine enrolled as a student in the WCSD pursuant to the terms of the 1991-92 IEP. (Complaint Corrected Ex. A at 1-2.)

Jensine remained enrolled as a student in the WCSD during the 1992-93, 1993-94, and 1994-95 school years. (Complaint ¶ 7; Complaint Corrected Ex. A at 1.) During each of those

years, Jensine received special education services in accordance with her IEPs. (Complaint ¶ 7.)

During the spring of 1995, Plaintiff WCSD prepared an IEP for the 1995-96 school year. (Complaint ¶ 12; Complaint Corrected Ex. A at 5-6; Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3.) The 1995-96 IEP offered to provide to Jensine a five-week summer program at her regular elementary school. (Complaint ¶ 12; Complaint Corrected Ex. A at 5-6; Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3.) Defendants, however, rejected the proposed summer program. (Complaint ¶ 12; Complaint Corrected Ex. A at 5-6; Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3.)

On August 18, 1995, Plaintiff WCSD held a second IEP meeting to prepare an IEP for the 1995-96 school year. (Complaint ¶ 13; Complaint Corrected Ex. A at 6; Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3.) Defendants rejected the IEP for the 1995-96 school year proposed by Plaintiff WCSD. (Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3.)

Defendants unilaterally removed Jensine from the WCSD in the summer of 1995, and enrolled her in Orange Grove Center, a private facility located in Chattanooga, Tennessee. (Answer and Cross-Complaint ¶ 35; Defendants' Resp. to Mand. Discl. ¶ 3: Plaintiffs' Resp. to Mand. Discl. ¶ 1, Complaint ¶ 14; Complaint Corrected Ex. A at 1, 6.) Jensine remained enrolled as a student at the Orange Grove Center from August 1995 until March 1997. (Complaint ¶ 17; Aff. of Cheri Harr ¶ 2.)

In July 1996, Defendants requested a due process hearing to contest the validity of the programs offered by Plaintiff WCSD for the 1995-96 school year and for the following years. (Defendants' Resp. to Mand. Discl. ¶ 3; Plaintiffs'

Resp. to Mand. Discl. ¶ 1; Complaint ¶ 18.) In August 1996, after receiving notice of Defendants' request for a due process hearing, Plaintiff WCSD offered to convene another IEP meeting for Jensine. (Answer and Cross-Complaint ¶ 36; Defendants' Resp. to Mand. Discl. ¶ 3.) Defendants declined the offer. (Answer and Cross-Complaint ¶ 36; Defendants' Resp. to Mand. Discl. ¶ 3.)

Soon thereafter, an administrative hearing officer held a due process hearing, and issued a decision on February 10, 1997. (Complaint Corrected Ex. A.) The administrative hearing officer concluded that Plaintiffs had failed to provide Jensine with an appropriate, free public education for the 1995-96 school year. (*Id.* at 12, 21-22.) Accordingly, the administrative hearing officer ordered Plaintiffs to reimburse Defendants for the costs associated with Jensine's education during the 1995-96 school year. (*Id.* at 22-24.) The administrative hearing officer declined to award Defendants the costs associated with Jensine's education during the 1996-97 school year, because no IEP had been completed for Jensine for the 1996-97 school year. (*Id.* at 23.)

On March 12, 1997, Plaintiffs initiated the instant action. Plaintiffs appeal from the decision of the administrative hearing officer awarding reimbursement to Defendants for the costs associated with Jensine's education during the 1995-96 school year. (Complaint ¶¶ 26-31.) Defendants assert a Cross-Complaint against Plaintiffs, alleging that the administrative hearing officer erred in declining to award reimbursement to Defendants for the costs associated with Jensine's education during the 1996-97 school year. (Answer and Cross-Complaint ¶ 41.)

II. Discovery Motions

A. Plaintiffs' Motion to Submit Additional Evidence

Plaintiffs request that the Court enter an Order providing that the Court will consider evidence in addition to the administrative record below if the evidence otherwise is admissible. Defendants argue that the Court should deny Plaintiffs' Motion for two reasons: (1) the Court lacks subject-matter jurisdiction over the case because Plaintiffs neglected to file a notice of appeal with the Office of State Administrative Hearings ("OSAH"), as required by State regulations;[1] and (2) Plaintiffs cannot satisfy the standard for submitting additional evidence.

1. Defendants' Argument That the Court Lacks Subject-Matter Jurisdiction

Defendants first argue that the Court lacks subject-matter jurisdiction over the instant case because Plaintiffs failed to file a Notice of Appeal with the OSAH, as required by State regulations. The regulation governing petitions for judicial review of decisions by administrative hearing officers provides:

> Unless otherwise specified by statute or a rule of a Referring Agency, a copy of any petition for judicial review of an Initial Decision . . . shall be filed with the Clerk simultaneously with the service of the petition upon the Referring Agency. . . . Upon receipt of such a petition, the Clerk shall compile and certify a copy of the record of the hearing to the reviewing court on behalf of the Referring Agency.

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[1] As a result of Plaintiffs' failure to file a notice of appeal, Defendants argue, the record of the administrative proceedings was not submitted to the Court. The Court notes that the Clerk of Court received the administrative record on July 22, 1997, two days before Defendants filed their Response.

Ga. Comp. R. & Regs. r. 616-1-2-.39. Defendants argue that Georgia case law establishes that failure to comply with the notice provision of r. 616-1-2-.39 deprives this Court of subject-matter jurisdiction over the instant case. *See Cooper v. Gwinnett County Board of Education*, 157 Ga. App. 289, 289-90 (1981) (finding that a state court lacked subject-matter jurisdiction to hear a discharged teacher's challenge to the determination of an administrative hearing officer, because the teacher had failed to file a notice of appeal).

For two reasons, the Court finds Defendants' argument unpersuasive. First, uncertainty exists whether r. 616-1-2-.39 applies to IDEA claims. Section 20-2-1160(f) of the Georgia code governs provisions for resolving complaints relating to the education of handicapped children under the IDEA, and requires the State Board of Education to promulgate rules and regulations governing the procedures relating to such claims. § 20-2-1160(f). The regulations promulgated by the Georgia Board of Education pursuant to § 20-2-1160(f) do not mention whether r. 616-1-2-.39's notice requirement applies to IDEA claims. *Cf.* Ga. Comp. R. & Regs. r. 160-4-7-.03(7)(b)(6)(vii) (containing no mention of r. 616-1-2-.39's notice requirement when setting forth procedures for resolving IDEA claims).

Similarly, none of the cases cited by Defendants address IDEA claims, and the Court's own research reveals that no Georgia cases have applied the notice requirement of r. 616-1-2-.39 to IDEA claims. The Court therefore believes that it is unclear whether the notice requirement of r. 616-1-2-.39 applies to IDEA cases.

Second, even if the notice requirement of r. 616-1-2-.39 applies to IDEA claims, the notice requirement would not apply to limit this Court's subject-matter jurisdiction. The Court otherwise would have subject-matter jurisdiction over the instant case pursuant to 28 U.S.C.A. § 1331, which

provides for subject-matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331. Congress alone has the authority to define the subject-matter jurisdiction of the federal district courts; State statutes or regulations therefore cannot limit a federal district court's subject-matter jurisdiction. *See Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137, 142 (5th Cir. 1972) ("Only Congress has the prerogative of defining the jurisdiction of the lower federal courts.")[2]; *Lamb v. United States*, 526 F. Supp. 1117, 1126 (M.D. Ga. 1981) ("the legislature and appellate courts of [Georgia] have no power to define or defeat the jurisdiction of this United States District Court"); *Clark v. Times Square Stores Corp.*, 469 F. Supp. 654, 655 (S.D.N.Y. 1979) ("'it is well established that state statutes cannot limit the jurisdiction . . . of the federal courts'") (quoting *Griffith v. Bank of New York*, 147 F.2d 899, 904 (2d Cir. 1945)).[3]

The Court therefore rejects Defendants' argument that the Court lacks subject-matter jurisdiction over the instant case because Plaintiffs failed to comply with r. 616-1-2-.39's notice requirement.

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[2] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

[3] Because the subject-matter jurisdiction of the federal courts is solely a matter of federal law, the Court respectfully declines Defendants' tempting invitation to analyze the implications of the *Erie* doctrine with respect to the instant case.

2. Defendants' Argument That Plaintiffs Have Failed to Satisfy the Requirements for Submitting Additional Evidence Pursuant to § 1415(e)(2)

Plaintiffs request the Court to enter an order providing that the Court will admit evidence in addition to the record of the administrative proceedings. Plaintiffs, however, have offered no specific evidence for admission.

Section 1415(e)(2) of the IDEA governs the scope of the Court's review of a decision by an administrative hearing officer, and provides:

> In any action . . . the court shall receive the records of the administrative proceedings, *shall hear additional evidence at the request of a party*, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C.A. § 1415(e)(2) (emphasis added). The Court has discretion whether to admit evidence in addition to the records of the administrative proceedings. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995); *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 791. (1st Cir. 1984), *aff'd sub nom. on other grounds, School Comm. of Town of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985). Because the possibility exists that evidence beyond the records of the administrative proceedings will be admissible, the parties are authorized to conduct discovery in this case to the extent permitted by the Federal Rules of Civil Procedure. *See Cook v. District of Columbia*, No. 93-0172-LFO, 1994 WL 413326, at *1 (D.D.C. July 19, 1994) (unpublished) (noting that no authority supported defendants' argument that plaintiffs in actions under the IDEA were not entitled to take discovery when appealing from adverse administrative decisions).

When deciding whether to admit evidence pursuant to § 1415(e)(2), the Court first must "evaluate a party's proffered evidence before deciding to exclude it." *Susan N.*,

70 F.3d at 759. With respect to the instant Motion, the Court observes that Plaintiffs have offered for admission no evidence in addition to the records of the administrative proceeding. Plaintiffs' Motion therefore is premature. For the parties' convenience, however, the Court will set forth the legal principles governing the admission of this evidence under § 1415(e)(2).

The Eleventh Circuit has not yet expressed an opinion as to the proper meaning to be given the phrase "additional evidence," and a difference in opinion exists among the other circuit courts. The First, Seventh, and Ninth Circuits have adopted restrictive definitions of the word "additional," and have construed the term to mean "supplemental." *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993); *Town of Burlington*, 736 F.2d at 790. By interpreting the word "additional" in this manner, these circuits take the position that the IDEA:

> contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial. The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

Town of Burlington, 736 F.2d at 790. Such an interpretation greatly restricts the additional evidence that the district court may consider when reviewing an administrative hearing officer's decision.

The Sixth Circuit, however, has repudiated the idea that "additional evidence is admissible only in limited circum-

stances, such as to supplement or fill in the gaps in the evidence previously introduced." *See Metropolitan Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990). Instead, the Sixth Circuit construes the term "additional" in the following manner:

> "Additional," in its ordinary usage, implies something that is added, or something that exists by way of addition. To "add" means to join or unite; the limitation on what can be joined inherent in the term "supplement" is not present in the term "add."

Id. at 234. The Sixth Circuit's interpretation of the term "additional" thus permits the district court to consider not only evidence that "supplements" the administrative record, but also any other evidence that is relevant to the proceedings. *Id.*

The Court finds the Sixth Circuit's interpretation of the term "additional evidence" persuasive. The Court therefore is inclined to apply the interpretation adopted by the Sixth Circuit in reviewing future motions for the admission of additional evidence, unless Defendants can convince the Court otherwise by citing appropriate authority.

As discussed above, Plaintiffs' Motion is premature because Plaintiffs have offered no specific evidence for admission. At the conclusion of discovery, however, Plaintiffs may file an additional Motion with the Court requesting the Court to admit additional evidence. The Motion should specify the evidence Plaintiffs wish the Court to consider, and should contain a statement of the reasons supporting admission of the additional evidence.

B. Defendants' Motion for Protective Order

Defendants request the Court to enter a Protective Order eliminating Defendants' obligation to respond to certain Interrogatories propounded by Plaintiffs. Defendants argue

that the Interrogatories "seek unlimited discovery of matters known to [Plaintiffs] at the administrative level, seek vague and indefinite discovery and promote discovery for purposes of annoyance and oppression." [4]

When considering Defendants' Motion, the Court is mindful of the standards governing the issuance of protective orders, as outlined by Rule 26(c) of the Federal Rules of Civil Procedure:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Fed. R. Civ. P. 26(c). The decision whether to issue a protective order lies within the discretion of the district court. *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985). A district court may grant a motion for a protective order if "good cause" exists. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). When determining whether good cause exists, the district court must consider four factors: "(1) the severity and the likelihood of the perceived harm; (2) the precision with which the order is drawn; (3) the availability of a less onerous alternative; and (4) the duration of the order." *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (quoting *Kleiner v.*

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[4] As previously noted, to the extent that Defendants argue that the Court should limit the scope of discovery in the instant case merely because this case is an IDEA proceeding, the Court rejects Defendants' argument.

First Nat'l Bank of Atlanta, 751 F.2d 1193, 1205 (11th Cir. 1985)). The district court also must balance the interests of the parties when deciding whether to grant a motion for a protective order. *In re Alexander Grant & Co. Litig.*, 820 F.2d at 355.

Defendants argue that the Court should enter a protective order relieving Defendants of their obligation to respond to the Interrogatories propounded by Plaintiffs because the Interrogatories seek information that: (1) is unlimited in nature; (2) already is known to Plaintiffs from the administrative proceedings; and (3) already has been produced to Plaintiffs during the administrative proceedings. After reviewing Plaintiffs' Interrogatories and Defendants' objections in light of Rule 26(c) and Eleventh Circuit case law interpreting Rule 26(c), the Court declines to enter a protective order at this time.[5] The Court, however, believes that Defendants should not be obligated to produce to Plaintiffs information that already is available to Plaintiffs as a result of the administrative proceedings. In the event that Plaintiffs' Interrogatories request Defendants to produce information that Defendants already have made available to Plaintiffs through the administrative proceedings, Defendants' Responses to Plaintiffs' Interrogatories should state as such, and also should provide a brief explanation of the manner in which this information was disclosed to Plaintiffs.

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[5] Additionally, the Court notes that Defendants' Motion is procedurally defective. Defendants failed to submit in support of their Motion for Protective Order a certification that Defendants conferred in good faith with Plaintiffs, as required by Rule 26(c) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(c) (a court may grant a protective order upon motion "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action").

III. Plaintiffs' Motion For Summary Judgment as to Defendants' Cross-Complaint

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (1992). In short, everything in the record must demonstrate the absence of a genuine issue of material fact. *Tippins v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986).

The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The moving party's burden is discharged by " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In assessing whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). Once the moving party has supported its burden adequately, the nonmovant has the burden of showing summary judgment is improper by coming forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When considering motions for summary judgment, the Court does not make decisions as to the merits of disputed factual issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Ryder Int'l Corp. v. First American Nat'l*

Bank, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the Court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts which do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

In addition to materiality, courts also must consider the genuineness of the alleged dispute. *Anderson*, 477 U.S. at 248. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Id.* at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). The standard for summary judgment thus mirrors that for a directed verdict: "[T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

B. Discussion

Plaintiffs request the Court to award summary judgment in their favor with respect to Defendants' cross-claim. Plaintiffs argue that Defendants' cross-claim is time-barred because Defendants did not file their cross-claim within 30 days after the issuance of the administrative hearing officer's decision.

Although Defendants' pleading is titled a "Cross-Complaint," the pleading actually is a counterclaim. The Court therefore will treat the pleading as if Defendants had

labeled it correctly. *See* Fed. R. Civ. P. 8(c) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.")

1. Applicable Statute of Limitations for Appeals of Administrative Decisions Pursuant to §1415(e)(2)

To ascertain whether Defendants' counterclaim is time-barred, the Court first must determine the statute of limitations applicable to appeals of administrative decisions under IDEA. The IDEA itself contains no provision with respect to time limitations for appealing administrative decisions pursuant to § 1415(e)(2). *Zipperer v. School Bd. of Seminole County*, 111 F.3d 847, 850 (11th Cir. 1997); *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1570 n.1 (11th Cir. 1991). In situations where a federal statute does not contain a statute of limitations provision, the Court "borrows" the State statute that is most closely analogous to the federal statute at issue. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995); *Board of Regents v. Tomanio*, 446 U.S. 478, 484-85 (1980). The Court also "borrows" corresponding State rules governing "tolling" of the statute of limitations. *Tomanio*, 446 U.S. at 485-86 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975)). "When the state limitations period applicable to the most analogous state law is inconsistent with the policies of the federal statute, however, the state limitations period is rejected." *Zipperer*, 111 F.3d at 850 (citing *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1502 (11th Cir. 1986)).

The Eleventh Circuit has not expressed an opinion as to the statute of limitations applicable to IDEA actions pursuant to § 1415(e)(2). For two reasons, however, the Court believes that the Eleventh Circuit would apply the 30-day limitations period provided in O.C.G.A. § 50-13-19(a), which governs

appeals of final decisions issued by State agencies. First, the Eleventh Circuit, in dicta, has expressed approval of an opinion by the Ninth Circuit, *Department of Education v. Carl D.*, 695 F.2d 1154 (9th Cir. 1983), that borrowed a state 30-day limitations period for appeals of administrative actions for causes of actions brought under § 1415(e)(2). *JSK*, 941 F.2d at 1570 n.2. Second, the Court believes that the 30-day limitations period provided by § 50-13-19(a) is consistent with the policies of the IDEA, which emphasize the "'prompt resolution of disputes over education plans for [disabled] children.'" *JSK*, 941 F.2d at 1570 n.2 (quoting *Carl D.*, 695 F.2d at 1157).

In addition, *Zipperer* does not suggest that the Eleventh Circuit would not "borrow" the thirty-day statute of limitations with respect to claims brought pursuant to § 1415 (e)(2). In *Zipperer*, the Eleventh Circuit rejected the thirty-day statute of limitations with respect to claims for attorneys' fees pursuant to § 1415(e)(4)(B), and instead borrowed a four-year statute of limitations applicable to actions founded on statutory liability. 111 F.3d at 851-52. The Eleventh Circuit, however, stressed that 'nothing in this case should be viewed as a ruling on the applicable statute of limitations for a substantive appeal of an administrative hearing under § 1415(e)(2)." *Id.* at 850 n.1. The Court therefore concludes that *Zipperer* does not foreclose an application of § 50-13-19(a)'s 30-day limitations period to the instant case.

The Court therefore applies the 30-day limitations period provided in § 50-3-19(a) to Defendants' counterclaim.

2. Tolling of the Thirty-Day Statute of Limitations

a. Applicability of O.C.G.A. § 9-3-97

Defendants argue that, even if the 30-day statute of limitations applies to Defendants' counterclaim, the filing of Plaintiffs' Complaint tolled the 30-day statute of limitations.

As discussed in Part III.B.1., *supra*, when a federal statute does not contain a provision with respect to time limitations, the Court "borrows" the most closely analogous State statute of limitations, and also applies corresponding State tolling rules. *North Star Steel Co.*, 515 U.S. at 34; *Tomanio*, 446 U.S. at 484-86 (quoting *Johnson*, 421 U.S. at 462).

A Georgia statute, O.C.G.A. § 9-3-97, governs the tolling of the statute of limitations for counterclaims. The provision states:

> The limitations of time within which various actions may be commenced and pursued within this state to enforce the rights of the parties are extended, only insofar as the enforcement of rights which may be instituted by way of counterclaim and cross-claim, so as to allow parties, up to and including the last day upon which the answer or other defensive pleadings should have been filed, to commence the prosecution and enforcement of rights by way of counterclaim and cross-claim, provided that the final date allowed by such limitations for the commencement of such actions shall not have expired prior to the filing of the main action.

O.C.G.A. § 9-3-97. Under Georgia law, the statute of limitations thus is tolled with respect to counterclaims if: (1) the complaint is filed within the applicable statute of limitations; and (2) the counterclaim is asserted within the applicable time for filing an answer to the complaint or raising defenses to the complaint.

The Court believes that "borrowing" the tolling provision of § 9-3-97 is appropriate in the instant case. First, although Defendants' pleading is titled a "Cross-Complaint," the pleading actually is a counterclaim, and the Court will treat the pleading as if Defendants had labeled it appropriately. *See* Fed. R. Civ. P. 8(c).

Second, the Court believes that "borrowing" the tolling rule of § 9-3-97 is consistent with the policies underlying the IDEA. A major purpose of the IDEA is assuring the " 'prompt resolution of disputes over educational plans for [disabled] children.' " *JSK*, 941 F.2d at 1570 n.2 (quoting *Carl D.*, 695 F.2d at 1157). Tolling the statute of limitations for the period of time allotted to Defendants for filing their answer to Plaintiffs' Complaint interferes slightly with the prompt resolution of Plaintiffs' IDEA action, but provides great gains in fairness. The Court therefore believes that § 9-3-97 is not inconsistent with the purposes of the IDEA, and applies § 9-3-97's tolling period to Defendants' Cross-Complaint.

Given the Court's decision to adopt the tolling provision of § 9-3-97, the Court will examine the timing of the pleadings filed in the instant case. On February 10, 1997, the administrative hearing officer issued his opinion in the administrative hearings below. On March 12, 1997, Plaintiffs filed their Complaint in the instant action. Plaintiffs therefore filed their Complaint within the applicable 30-day statute of limitations, satisfying § 9-3-97's first requirement.

On March 13, 1997, Plaintiffs requested that Defendants waive service of Plaintiffs' Complaint pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. (Defendants' Statement of Material Facts Ex. A.) On April 11, 1995, Defendants waived service. (Defendants' Statement of Material Facts Ex. B.) By waiving service of Plaintiffs' Complaint, Defendants extended the time for filing of an answer or responsive pleading until 60 days after Plaintiffs' Request for Waiver of Service. Fed. R. Civ. P. 4(d)(3). On May 6, 1997, within 60 days of Plaintiffs' Request for Waiver of Service, Defendants filed their Answer and Cross-Complaint. Defendants thus filed their counterclaim within the applicable time period, satisfying § 9-3-97's second

requirement. The Court therefore concludes that Defendants' counterclaim satisfies the tolling requirements of § 9-3-97.

b. Applicability of § 9-3-97 to Defendants' Counterclaim

Plaintiffs argue that, even if the Court "borrows" § 9-3-97's tolling provision, § 9-3-97 should not apply to Defendants' counterclaim because Defendants' counterclaim is a permissive, rather than a compulsory, counterclaim. For three reasons, the Court rejects Plaintiffs' argument.

First, the plain language of § 9-3-97 refers simply to counterclaims, and makes no distinction between compulsory and permissive counterclaims. § 9-3-97. Second, recent Georgia decisions have not distinguished between compulsory and permissive counterclaims when applying § 9-397 to toll the applicable statute of limitations. *See Vikowsky v. Savannah Appliance Serv. Corp.*, 179 Ga. App. 135, 136 (1986) ("With regard to *counterclaims*, Georgia law provides that limitations of time are extended to permit the assertion of a *counterclaim* until the last day upon which an answer is to be filed.") (emphasis added); *Equitable Bank v. Brown*, 177 Ga. App. 776, 777 (1986) (making no distinction between permissive and compulsory counterclaims).

Third, even if § 9-3-97 applies only to compulsory counterclaims, the Court believes that Defendants' Cross-Complaint states a compulsory counterclaim. To determine whether a counterclaim is a compulsory counterclaim, the Eleventh Circuit employs the "logical relation test." *Plant v. Blazer Financial Servs., Inc. of Georgia*, 598 F.2d 1357, 1361 (5th Cir. 1979). Under the logical relation test, a counterclaim is a compulsory counterclaim if it bears a logical relationship to the primary claim. *Id.* at 1360. A logical relationship exists "when the counterclaim arises from the same 'aggregate of operative facts' " as the main claim. *Id.* at 1361. The counterclaim arises from the same "aggregate of operative

facts" as the main claim when "the same operative facts serve[] as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant." *Id.* (citing *Revere Copper & Brass, Inc. v. Aetna Cas. and Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970)).

Applying the logical relationship test to Defendants' counterclaim, the Court believes that Defendants have asserted a compulsory counterclaim. A single aggregate of operative facts—the administrative hearing officer's decision—gave rise to both Plaintiffs' claim and Defendants' counterclaim. Both claims arise from the following facts: (1) the nature and extent of Jensine's disability and her need for special education services; (2) the nature and extent of special education services provided to Jensine by Plaintiff WCSD; (3) Jensine's progress while enrolled as a student in the WCSD; and (4) Jensine's progress while enrolled as a student at the Orange Grove Center. The Court therefore believes that a logical relation exists between Plaintiffs' claim and Defendants' counterclaim.[6]

3. Summary

In sum, the Court concludes that the 30-day statute of limitations period provided by § 50-3-19(a) applies to the instant case. The Court also concludes that the tolling provision of § 9-3-97 applies to Defendants' counterclaim, and that Defendants' counterclaim thus was filed in a timely fashion. Plaintiffs therefore are not entitled to summary judgment with respect to Defendants' counterclaim.

---

[6] Because the Court concludes that the tolling requirements of § 9-3-97 apply to Defendants' Cross-Complaint, the Court need not address Defendants' arguments relating to equitable tolling.

IV. Defendants' Motion for Final Judgment and Appropriate Relief on *De Novo* Review

Defendants request the Court to conduct a *de novo* review of the administrative record and to affirm the decision of the administrative hearing officer. Defendants also request the Court to award Defendants other appropriate relief. (Defendants' Mot. for Final Judgment and *De Novo* Review, at 3.) Defendants' Motion, however, presumes that the Court will rule against Plaintiffs on both Plaintiffs' Motion to Submit Additional Evidence and Plaintiffs' Motion for Summary Judgment. (Defendants' Brief on *De Novo* Review and in Supp. of Mot. for Final Judgment, at 2.) In Part II.A.2., *supra*, the Court noted that it would consider admitting specific additional evidence at the appropriate time and upon proper motion. Defendants' Motion thus is premature. The Court therefore denies Defendants' Motion at this time. Defendants, however, may refile their Motion after the conclusion of discovery.

V. Conclusion

ACCORDINGLY, the Court GRANTS Plaintiffs' Motion to Submit Additional Evidence [10]. After the conclusion of discovery and upon proper motion, the Court will admit additional evidence that: (1) satisfies the standard for admissibility under § 1415(e)(2); and (2) otherwise is admissible.[7]

The Court DENIES Plaintiffs' Motion for Summary Judgment as to Defendants' Cross-Complaint [11], and

---

[7] Pursuant to the Consent Decree and Order Staying Discovery, the discovery period will recommence 10 days after the date of this Order, and will continue for a 60-day period. The Court does not anticipate granting extensions of the discovery period.

DENIES Defendants' Motion for Protective Order [15]. The Court ORDERS Defendants to respond to Plaintiffs' Interrogatories as instructed in Part II.B. of this Order.

The Court also DENIES Defendants' Motion for Final Judgment and Appropriate Relief on *De Novo* Review [20] with leave to refile the Motion after the conclusion of the discovery period.

IT IS SO ORDERED, this the 28th day of January, 1998.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX G

[Filed Jun. 7, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10140-QQ

WALKER COUNTY SCHOOL DISTRICT,
JEWEL CAMPBELL, *et al.*,
Plaintiffs-Counter-Claimants-Appellants,

versus

JENSINE BENNETT, a minor, by and through her parents and legal guardians, JOHN & DENISE BENNETT, JOHN BENNETT, DENISE BENNETT,
Defendants-Counter-Claimants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and HULL, Circuit Judges, and HODGES*, Senior District Judge.

---

* Honorable Wm. Terrell Hodges, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

Entered For The Court:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

MOTION FILED
NOV - 3 2000
(2)

No. 00-527

IN THE
Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,
Petitioner,

v.

JENSINE BENNETT, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, AND GEORGIA SCHOOL BOARDS ASSOCIATION

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IN THE

Supreme Court of the United States

No. 00-527

WALKER COUNTY SCHOOL DISTRICT,
Petitioner,

v.

JENSINE BENNETT, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National School Boards Association, the National Association of State Directors of Special Education, the National Association of School Psychologists, and the Georgia School Boards Association, respectfully request leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Counsel for Petitioner Walker County School District has consented to the filing of this brief. Counsel for Respondent Jensine Bennett has not consented.

The National School Boards Association ("NSBA") is a not-for-profit federation of 49 state school board associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, Guam, and the U.S.

Virgin Islands. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of the elementary and secondary students in the nation.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit professional organization established in 1938 representing the state administrators of education programs for children and youth with disabilities in the 50 states, the District of Columbia, Puerto Rico, the Bureau of Indian Affairs, the Department of Defense Dependent Schools, and other Federal jurisdictions. NASDSE operates for the purpose of providing services to its members to facilitate their efforts to maximize educational outcomes for individuals with disabilities.

The National Association of School Psychologists ("NASP") is a not-for-profit national professional association representing over 21,500 members, most of whom work in educational settings from preschool through higher education. Regular membership is open to anyone who is currently working or credentialed as a school psychologist; trained as a school psychologist and working as a consultant or a supervisor of psychological services; or primarily engaged in the training of school psychologists at a college or university, promoting educationally and psychologically healthy environments for all children and youth by implementing research-based, effective programs that prevent problems, enhance independence, and promote optimal learning. This is accomplished through state-of-the-art research and training, advocacy, ongoing program evaluation, and caring professional service.

The Georgia School Boards Association ("GSBA") serves as an advocate for Georgia's public education system and

works to enhance the ideal governance structure for Georgia's public schools having an elected board of education and an appointed superintendent. As a voluntary, statewide organization, GSBA works collectively for Georgia's 180 boards of education by offering in-service training, technical assistance and a vast array of services and resources to local school systems and school board members. GSBA's membership is comprised of the state's local boards of education. GSBA also has a number of Associate and Attorneys Council members.

These four organizations share a long history of involvement in the implementation of special education laws, including the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, in Georgia and throughout the Nation. Their members have a strong interest in resolution of the Circuit conflict that presently exists as to whether federal district courts must – in the plain language of the IDEA – "hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(B). They also have a strong interest in correcting the Eleventh's Circuit erroneous ruling in this case, which will unfairly prejudice parents and school districts alike by precluding consideration of evidence that may well be critical to the proper implementation of the IDEA.

Respectfully submitted,

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IN THE

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WALKER COUNTY SCHOOL DISTRICT,
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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE

The National School Boards Association, the National Association of State Directors of Special Education, the National Association of School Psychologists, and the Georgia School Boards Association, respectfully submit this brief *amicus curiae* in support of Petitioner Walker County School District.

INTEREST OF AMICI

The interest of *amicus* is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.*

---

*Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or undersigned counsel contributed money or services to the preparation or submission of this brief.

STATEMENT

The Individuals with Disabilities Education Act ("IDEA") provides "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). The "free appropriate public education" required by the IDEA is tailored to the needs of each child by means of an "individualized education program" ("IEP"), which is a written statement developed, reviewed and revised by state and local education entities and parents. *Id.* § 1414(d). Parents who are dissatisfied with a school district's IEP are entitled to a due process hearing conducted by the state educational agency. *Id.* § 1415(f)(1).

Any party to such a hearing aggrieved by the findings and decision has the right to bring a civil action – as opposed to an administrative appeal – in state court or federal district court. *Id.* § 1415(i)(2). Under § 1415(i)(2)(B), the district court in such actions "shall receive the records of the administrative proceedings," "shall hear additional evidence at the request of a party," and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

In this case, the parents of an autistic child challenged the IEP prepared by the Walker County School District in Walker County, Georgia. Following a due process hearing, which did not provide for full discovery and in which the School District was unable to obtain certain school records and testimony, an administrative law judge ruled that the IEP did not provide the child with a free appropriate education, and ordered that the

parents be reimbursed for the cost of the child's private schooling. The School District then filed a civil action under the IDEA.

This case arises out of the district court's interpretation of the IDEA provision that a district court "shall hear additional evidence at the request of a party." *See* 20 U.S.C. § 1415(i)(2)(B)(ii). Despite the mandatory nature of this statutory language, the district court refused to consider additional evidence that the School District sought to introduce in the civil action. The Eleventh Circuit affirmed, interpreting the phrase "shall hear additional evidence at the request of a party" not to mean that the court is required to hear evidence if a party so requests, but to mean instead that the district court may choose, in its discretion, to hear supplemental evidence.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because there is a pressing need for uniform interpretation and application of § 1415(i)(2) of the IDEA. This case presents a recurring legal question. Parents across the country file numerous challenges to IEPs every year. When these challenges reach the federal district courts in the form of civil actions, courts are virtually always faced with the decision of whether to admit "additional evidence." Yet, courts are divided about how to interpret the meaning of the phrase "shall hear additional evidence at the request of a party." As set forth in the petition for certiorari, the First, Fourth, Seventh and Ninth Circuits, like the Eleventh Circuit in this case, have interpreted "additional" narrowly to mean "supplemental." By contrast, the Third and Sixth Circuits have adopted broader interpretations that are more likely to enable parties to present relevant evidence that they

may not have been able to present in the state administrative hearing.

In the words of the Fourth Circuit, "there appears to be confusion as to the exact nature of the IDEA proceedings before the district courts." *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 385 & n.4 (4th Cir. 2000). For example, a school district filing an IDEA civil action in the Eleventh Circuit may be denied the opportunity to present a particular piece of additional evidence, while a similarly situated school district in a district court in the Sixth Circuit may be allowed to present the very same evidence. So long as this confusion persists, both parents and school districts will receive uneven treatment in essentially identical civil actions, based solely on geography.

This lack of uniformity is at odds with the statutory scheme established by the IDEA. Section 1415(i)(2) of the IDEA is intended to create standard procedures for civil actions challenging state administrative rulings regarding IEPs. While Congress did not intend the IDEA to displace the primacy of States in the field of education, *see Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 207-08 (1982), and allowed for state law to govern the due process hearings conducted by state educational agencies, *see* 20 U.S.C. § 1415(f), it nonetheless established uniform federal procedures to govern disputes between parents and school districts regarding IEPs once a civil action is filed. *See* 20 U.S.C. § 1415(i)(2). These procedures, including the provision that a court "shall hear additional evidence at the request of a party," serve an important purpose: they ensure that the numerous parents and school districts across the country, whose IEP challenges are subject to widely varying state

administrative systems, are afforded an equal and standardized opportunity to adjudicate their claims in a civil action.

Indeed, the question presented by this petition is particularly important precisely because of the variation among state administrative proceedings. For example, as discussed in the petition for certiorari, some States, such as Georgia, do not provide for the discovery of evidence in administrative hearings. Moreover, there is wide variation among States as to who may properly administer a due process hearing. Whereas some states reserve this role for lawyers, other States allow non-lawyer educators or others to serve as hearing officers. *See generally* Joseph R. McKinney & Geoff Schultz, *Hearing Officers, Case Characteristics, and Due Process Hearings*, 111 Educ. L. Rep. 1069 (1996) (discussing disparate outcomes of IDEA due process hearings depending on characteristics of hearing officers). The IDEA protects against these potentially wide variations in state proceedings by providing standard procedures in reviewing those decisions. It offends principles of fairness and the sound administration of justice to allow litigants in some Circuits to introduce new evidence in court in IDEA cases, while denying that right to litigants in other Circuits. If, however, courts continue to disagree about the meaning of the procedures to be followed in IDEA civil actions, the judiciary's role in the IDEA scheme will not be fully realized.

The petition for certiorari should also be granted because the Eleventh Circuit's interpretation of "additional evidence" is fundamentally unfair to parents and school districts alike. In many cases, including this one, a school district or parent may not be able to discover or present the full array of relevant evidence in the state administrative hearing due to state rules. Under the Eleventh Circuit's restrictive view of

§ 1415(i)(2)(B)(ii), such a party might well be denied the chance to present this additional evidence in a civil action in district court, as well. As a result, important and relevant evidence might never be considered by any decisionmaker at any stage of review.

Finally, the Eleventh Circuit's interpretation contravenes the plain language of the provision, which states that a court "shall" hear evidence "at the request of a party." *See* 20 U.S.C. § 1415(i)(2)(B)(ii). As the petition for certiorari argues, the use of the mandatory word, "shall," combined with the statement that the evidence be heard at the party's request, rather than in the court's discretion, strongly suggests that the Eleventh Circuit's reading is too narrow.

For these reasons, this Court should grant the petition for certiorari to resolve the conflict among the Courts of Appeals on this important issue so that IDEA is administered fairly and uniformly across the nation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 00-527

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IN THE

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WALKER COUNTY SCHOOL DISTRICT,

Petitioner,

v.

JENSINE BENNETT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Walker County School District seeks a Writ of Certiorari to review the Eleventh Circuit Court of Appeals' affirmation of the trial court judgment in favor of Respondents. That judgment was, in turn, an affirmation of the decision of the Administrative Law Judge [ALJ] in favor of the Respondents, who were the initial Grievants/ Petitioners in an administrative due process hearing held pursuant to 20 U.S.C. § 1415(b).[1] Respondents Jensine Bennett and her parents John and Denise Bennett are, respectively, a disabled child eligible for special education and related services and her parents residing within the jurisdiction of the Petitioner. The case concerns educational services provided to the disabled child in 1995.

Jensine has the condition of autism and other significant disabling impairments. In July 1996, Respondents, having removed Jensine from an inappropriate public school placement, requested a due process hearing under the Individuals with Disabilities Education Act, [IDEA] 20 U.S.C. §§ 1400 *et seq*. They contended that the 1995-1996 program offered by the Petitioner was not calculated to provide the child reasonable educational benefit and that it failed to provide her a free appropriate public education [FAPE] as required by IDEA. Respondents sought services in the only appropriate placement available, a school

1. The Individuals with Disabilities Act was amended in 1997 by Pub. L. 105-17, 111 Stat. 37 (1997). This provision is now 20 U.S.C. § 1415(f). The citations to IDEA in the administrative decision and some of the orders of the district court are to sections which have been recodified.

specializing in the treatment and education of autistic children. They also sought reimbursement for costs they expended on the placement as authorized by this Court in *Burlington Sch. Comm. v. Dept of Educ.*, 471 U.S. 359 (1985).

The Georgia Department of Education appointed an ALJ to hear the due process request who delayed the case at the request of the Petitioner to allow the School District's litigation expert access to Jensine's private school and the opportunity to conduct additional assessments and observations of the child. Thereafter, the ALJ conducted a full administrative trial and ruled that the educational program offered by the Petitioner did not provide the disabled child with FAPE. Accordingly, the ALJ ordered Petitioner to reimburse Respondent for Jensine's private day school for the 1995-1996 school year. In the administrative trial, hundreds of pages of school, psychological and medical records were exchanged and introduced by the parties. Petitioner tendered a pre-hearing witness list with dozens of witnesses. In total, twelve (12) lay and expert witnesses testified in the administrative trial. Petitioner preserved no objection as to the unavailability of any witness or the need to present additional evidence.

The Petitioner sued the Respondent seeking review of the administrative decision on March 12, 1997, and sought leave to submit unspecified additional evidence on July 7, 1997. On January 29, 1998, the district court acknowledged that certain evidence additional to the record of the administrative trial might be admissible, but found Petitioner's request inadequate as it failed to specify the particular evidence sought for admission. The court, at Petitioner's request, permitted full discovery but directed

Petitioner to file a motion after the completion of discovery requesting the admission of any specific additional evidence and stating the reasons supporting admission. The district court declined to reach the Family's motion for relief on *de novo* review at this time.

Following discovery, the Petitioner moved for consideration of specific additional evidence. On July 29, 1998, the district court considered each of the categories identified by Petitioner for admission and supplemented the record by admitting the deposition testimony of one (1) witness as additional evidence. The district court allowed the Petitioner to seek interlocutory review of this ruling and on November 30, 1998, the court of appeals denied the Petitioner's motion for permission to appeal.

On February 9, 1999, on further motion, the district court permitted Petitioner to introduce other documents as additional evidence. On February 25, 1999 the district court granted the Respondents' motion for final judgment and relief, affirming the decision of the ALJ after considering the additional evidence and making an independent review of the full record before it. The Petitioner appealed this judgment to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed the decisions of the trial judge and the findings of the ALJ. The petition for re-hearing *en banc* was denied by the circuit court on June 7, 2000.

B. Corrections to Petitioner's Statement of Facts

Given this Court's admonition that Respondents "have an obligation to the Court to point out in the brief in

opposition, and not later, any perceived misstatement in the petition," Sup. Ct. R. 15.2, Respondents show that the Petitioner misstated many of the events underlying the dispute. As an initial matter, Petitioner asserts that the individualized educational programs [IEPs] developed for Jensine prior to the 1995-1996 school year "were implemental without dispute." Petition at 4. To the contrary, the record before the ALJ and district court indicated that numerous expert evaluations, assessments and recommendations on the educational needs of the severely autistic Jensine were repeatedly ignored by the Petitioner. During Jensine's years in the Petitioner's school, Respondents urged and requested the type and duration of services recommended by experts in autism, including Petitioner's own experts, but these appropriate services were repeatedly omitted from Jensine's IEP. While the Respondent Family in an effort to work with the Petitioner did not file for due process during these years, Petitioner's assertion that they did not object to the failure in service is inaccurate.

Most glaring of the misstatements in the Petition is Petitioner's insistence that it was somehow denied crucial evidence at the administrative level. Despite the fact that neither Georgia's statutory scheme nor IDEA authorize discovery in due process hearings, Petitioner at the administrative level moved for and was permitted extraordinary pre-hearing discovery. The Petitioner made no contact with the Respondents from the IEP of August, 1995, until July 1996, when, after the Respondents sought due process, the Petitioner asked for the discovery opportunity to have its expert witness observe and evaluate Jensine. Respondents urged the ALJ that allowing such access by a witness hired for the sole purpose of defending the administrative claim was tantamount to discovery which is

neither contemplated in the IDEA administrative scheme nor allowed by Georgia state statute O.C.G.A. § 50-13-40(c) or regulations OSAH OFF. REG. § 616-1-2.38. The ALJ, nonetheless, ordered the observation/evaluation and Petitioner's expert witness went to the private placement to observe and evaluate Jensine and question the staff about her. This process delayed the hearing beyond the time for resolution permitted by state and federal law, over the Respondents' objections. Petitioner's argument that it was prohibited from conducting discovery at the administrative level and that it was unable to obtain records and testimony from the private placement prior to the hearing is not an accurate representation of the process utilized. Petition at 4-5. Furthermore, Petitioner's expert witness was tendered at the administrative hearing without objection by the Petitioner as to the adequacy of the material available to him.

Petitioner also asserts that Respondents' sole objections to the IEP developed for Jensine for the 1995-1996 school year centered on the lack of a summer program, the omission of occupational therapy services and lack of one-to-one services. Petition at 4. The evidence before the ALJ and the district court, however, indicated Respondents' objection was to the IEP in its entirety, including the lack of adequate goals concerning self-injurious behaviors, focus, communication and transition; the lack of IEP services designating expert training and consultation for school personnel; and the lack of a behavior management plan. Respondents also objected to the repeated lack of progress in Petitioner's program and to the Petitioner's tolerance for Jensine's serious self-injurious behaviors. The ALJ and district court found the IEP inadequate based on the lack of occupational therapy,

one-to-one services and inadequate summer services, not reaching Respondents' numerous other objections to the program.

Petitioner also misstates that it was unable to obtain Jensine's private school records prior to the hearing. Petition at 5. Respondents exchanged with Petitioner all records from the private school available to them five (5) days before the initiation of the hearing. The exchange was mandated by IDEA's hearing provisions as an alternative to traditional discovery and in the interest of disclosure.

Petitioner, likewise, asserts it was unable to obtain testimony of the private school employees or the in-state evaluator prior to the administrative hearing. *Id.* Petitioner's expert was provided unprecedented access to the private school employees pursuant to the pre-hearing order of the ALJ. Additionally, at the administrative hearing several witnesses from out-of-state attended cooperatively and voluntarily when requested to do so by the parties. The in-state evaluator was readily available to Petitioner, attending IEP meetings, and providing his written evaluation and opinions during the IEP process. Contrary to the implication in the Petition, the in-state evaluator testified and was cross-examined by Petitioner at the administrative hearing. In total, a dozen witnesses testified and hundreds of pages of exhibits and records were introduced into evidence. At no point in the process has Petitioner raised objections related to the unavailability of witnesses or documents.

The principal witness Petitioner sought to re-tender to the trial court was the same expert who had already testified in the administrative hearing. When asked the scope of such

testimony the Petitioner asserted that it would be similar to that in the administrative record. Petitioner emphasized it was contesting the credibility choices of the ALJ and believed that the trial court should re-hear this witness even though the transcript of the expert's testimony was already in evidence. Petitioner also sought the testimony from an additional, duplicate expert witness and defined the scope of such potential testimony as the same as the expert witness who previously testified. There also were witnesses the Petitioner sought to introduce who had previously testified or who were on listed on the Petitioner's initial witness list for the administrative hearing but did not to call. Several of these witnesses had been participants at IEP meetings, but multiple witnesses had previously testified about these meetings and the required minutes and records of the meetings were in evidence. In the trial court, the Petitioner never attempted to make a showing of unavailability of these witnesses during the administrative hearing and the facts only indicated that Petitioner made a strategic choice to save witnesses for the trial court. At no time was a report, deposition, or affidavit of any putative additional expert witness offered to the district court as a proffer or to comply with the rules of procedure. Nonetheless, the district court considered Petitioner's arguments and in the exercise of discretion admitted the deposition of one witness which was not cumulative. It also admitted supplemental records from the private school concerning Jensine and her program.

In affirming, the trial court made a specific finding on each aspect of the requested supplemental evidence. These findings of the administrative availability of the witnesses and the cumulative nature of the multiple expert witness testimony were not appealed as erroneous.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not warrant review by this Court as there is no meaningful conflict among circuits. Instead, the circuits which have addressed the issue urged by Petitioner have agreed that as to additional evidence in IDEA cases, the trial court, pursuant to the Federal Rules of Evidence and tempered by the substantive statute, must make a discretionary determination of admissibility of evidence. The substantive statute at issue in the Petition is premised on "deference" by the district court to the administrative proceeding, at which parties have rights to a full evidentiary hearing, subpoenas, cross examination and confrontation of witnesses. 20 U.S.C. § 1415(h). *See Rowley v. Hendrick Hudson Sch. Dist.*, 458 U.S. 176, 205, 206 (1992). The Eleventh Circuit properly erected a standard appropriate to Georgia and consistent with the other circuits which takes into consideration multiple factors in the exercise of discretion. This is a standard which can be applied by all trial courts.

The court of appeals determination properly implements IDEA's duty to consider and, where appropriate, introduce additional evidence. The statutory use of the word "shall" does not mandate the unfettered admission of evidence as urged by Petitioner. Rather, the standard articulated by the Eleventh Circuit reaffirms a history of circuit case law which recognizes that the Federal Rules of Evidence also operate in any proceeding in a district court which has before it an IDEA administrative record. 20 U.S.C. § 1415(i)(2)(B). In any event, the rulings below limiting the introduction of evidence are independently sustainable under the Federal Rules of Evidence making this case inappropriate for consideration by this Court on a uniform standard. If one applies the *Bennett* rule, the Sixth Circuit rule or the First Circuit rule, the result would be identical.

REASONS FOR DENYING THE WRIT

I. THE CIRCUITS DO NOT CONFLICT ON THE DISTRICT COURTS' ROLE IN EXERCISING DISCRETION TO ALLOW OR TO STRIKE ADDITIONAL TESTIMONY

Petitioner argues that there is a sharp conflict between the First and Sixth Circuit's standards on the scope of evidence admissible in an IDEA case before the district court on *de novo* review. Petitioner 11-12. The argument ignores that the conflict, if any, is not over the discretionary duty of a trial court to rule on the admissibility of evidence, but a conflict on the semantics of the definition of "additional" evidence, i.e., as either "supplemental" to the administrative record, *Town of Burlington*, 736 F.2d 773, 790-791 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985), or "extra," *Metro. Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1991). This perceived difference in the definition of "additional," however, is neither functional nor outcome determinative, but as the appellate court below recognized, a matter of form over substance. Petitioner at 11a.

The Eleventh Circuit in the case below endorsed the First Circuit's multiple factors test on the admission of additional evidence set forth in *Town of Burlington v. Dept. of Edu.*, 736 F.2d 773 (1984), *aff'd on other grounds*, 471 U.S. 359 (1985). *Burlington*'s test for additional evidence considers the unavailability of witnesses, mechanical failures as to the transcript, the improper administrative exclusion of evidence and evidence of relevant subsequent events. The Eleventh Circuit cautioned that the factors of discretion are not an

exhaustive list, as other factors such as the availability or unavailability of discovery procedures in the administrative process must be considered. Petition at 9a-10a, and n.12. Other potential factors may be the failure of testimony, whether the parties were *pro se* or represented by counsel, whether the hearing was expedited, or, as in this case, delayed for months to allow the district to prepare its case, or any extraordinary reasons or events.

All the courts of appeal addressing the additional evidence standard under IDEA use reasoning similar to the Eleventh Circuit in adopting a series of considerations to frame the exercise of discretion allowing the trial court to act as it does in all cases, to manage the litigation and resolve evidentiary questions. In *Cook,* Petitioner's source of alleged circuit conflict, the Sixth Circuit found that a critical issue had not been addressed in the administrative proceeding, *i.e.*, the "least restrictive educational" environment appropriate to the student's needs. 915 F.2d at 235. To reach the previously unresolved issue, the district court allowed witnesses who had testified in the first administrative hearing to testify a second time on the area which had been unexplained in the administrative decision. *Id.* at 234. The Sixth Circuit was careful to explain that it was disagreeing with the position taken by the litigants before it said that *Burlington* supported "additional evidence only in limited circumstances" and declined to adopt that construction. *Id.* at 234. It then identified favorably that portion of *Burlington* also relied upon by the Eleventh Circuit. *Compare, Cook* at 234-235 with Petition at 9a. Finally, *Cook* endorsed a standard of judicial discretion in permitting the additional testimony. *Cook* at 235 ("[t]his portion of the opinion suggests that even the First Circuit would not have found fault with the consideration of the evidence of additional placements in the present case").

The Sixth Circuit's endorsement of the admission of such evidence is consistent with the First Circuit approach, and with that ultimately adopted by the Eleventh Circuit. The witnesses which were permitted did not present cumulative testimony, but testified as to a crucial substantive issue not dealt with by the ALJ. There was no retrying of issues for which the record was sufficient and no usurping of the administrative process and expertise. The Sixth Circuit further confirmed its consistent use of the *Burlington* standard in *Metro Bd. of Pub. Ed. v. Guest*, 193 F.3d 457 (1999) when it found error in the admission of additional evidence on issues not properly before the court. 193 F.2d at 463. Hence, the lone Circuit on which Petitioner relies presents, at best, an illusory conflict which upon closer examination does not represent a true disagreement.

Even utilizing the purported "restrictive" First Circuit's *Burlington* holding there is no real distinction between the circuits. *Burlington* reviews a district court order following a four-day trial which was supplemental to the administrative hearing. *Burlington*, 736 F.2d at 779. The district court evidentiary presentation occurred prior to this Court's holding in *Rowley v. Hendrick Hudson Sch. Dist.*, 458 U.S. 176, 206, that reviewing courts must give due weight to the administrative record and cautioning against substituting the reviewing court's judgement for the expertise of the administrative process. The First Circuit reviewed the district court's actions in light of the recent *Rowley* decision and found that the Act "does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony" as such would not be consistent with *Rowley*'s "due weight" requirement. *Id.* at 790. Acknowledging the court's inherent discretion in considering evidence, the First

Circuit rejected any rule that automatically prohibited testimony from all who actually or could have testified at the administrative hearing. It acknowledged that experts might testify to bring "this court up to date in the child's progress,"and that it would be "difficult to draw a sharp line" on evidentiary issues. Nonetheless, the First Circuit cautioned that the "determination of what is 'additional' evidence must be left to the discretion of the trial court." *Id.* at 791.[2]

Recognizing the overlap of *Cook* and *Burlington*, the Eleventh Circuit adopted the general language from *Town of Burlington* but reconciled the cases:

> The [Sixth Circuit] declined to approve the First Circuit's definition of "additional" to mean "supplemental" evidence; but the ultimate holding in *Cook* left the admission or exclusion of evidence in an IDEA proceeding to the sound discretion of the district court so that the difference between the First and Sixth Circuits on this point would seem to be more semantical that substantive.

Petitioner at 11a. The question to review is not the path a court takes to get to the standard, in this case the use of different dictionary definitions of "additional," but the rule of law actually established and available to the trial courts. The reality in the circuits is that there is a consistent and

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2. Under either *Burlington* or *Cook*, the court of appeals in the case *sub judice* would have been compelled to affirm the trial court's evidentiary findings. Using the *Cook* analysis, but applying the facts of *Burlington*, the Sixth Circuit would have reached the same evidentiary rulings permitted by the First Circuit in *Burlington*. Using the *Cook* facts, the *Burlington* court would have admitted the same additional evidence as the Sixth Circuit permitted.

sensible application of discretion utilized in IDEA cases on review which presents no conflict for this Court's consideration.

Other courts of appeals have addressed the IDEA additional evidence question in a consistent fashion. In *Independent Sch. Dist. No. 283 v. J.D.*, 88 F.3d 556, 560-61 (8th Cir. 1996), the Eight Circuit looked for "solid justification" to allow additional evidence. The additional evidence was denied, in part, on the basis of a 2000 page administrative hearing record and the requirement that the court must afford deference to the hearing officer's credibility choices in a fully litigated case. In *Monticello Sch. Dist. No. 25 v. George L. on behalf of Brock L.*, 102 F.3d 895 (7th Cir. 1996), the court of appeals affirmed the denial of additional evidence holding that the *Rowley* requirements of deference, due weight to the administrative decision makers and whether there was compliance with the Act's procedures limited the retrial in that case. *Id.*, at 901-02. The court noted that courts may exercise discretion to allow additional evidence "but we have certainly not mandated that a district court do so every time." *Id.* As the parents had not raised any claims that there were procedural errors by the administrative court, the extra evidence was not allowed.

In *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993), the Ninth Circuit also adopted the *Burlington* language. *Id.* at 1473, *quoting Burlington*, 736 F.2d at 790-91. It used a multi-factored test in its exercise of discretion and allowed new evidence to bring the court up-to-date. *Id.* In *O'Tolle v. Olathe Dist. Sch. Unified Dist. No. 233*, 144 F.3d 692, 708-09 (10th Cir. 1998) the court of appeals noted its previous holdings that "the district court has discretion to determine if additional evidence is

necessary" and upheld the prohibition against additional evidence not timely tendered, utilizing *Rowley's* deference in its analysis. In *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) the court of appeals also cited *Burlington* but noted that it did not want to transpose the administrative hearing into just a "dress rehearsal." *Id.*, at 667, *quoting Burlington*, 736 F.2d at 790-91 and *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997 (1st Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S. Ct. 1122, 113 L. Ed. 2d 230 (1991). The factor this court found dispositive was that there was no showing of unavailability of these witnesses and the information from these witnesses was earlier before the IEP committee. This court, like others, noted that allowing additional testimony after strategic decisions to withhold the testimony at the administrative hearing had been made would make the IDEA "process more time consuming, as parties scrambled to use the federal court proceeding to patch up holes in their administrative case." *Id.*, at 667. "Whether this lengthy process would serve students is doubtful at best." *Id.*

The standard utilized by the Eleventh Circuit also joins the First and Sixth Circuit's recognition that the district court process is a form of *de novo* review, not a *de novo* trial. As *Rowley* has instructed, the administrative hearing must be given deference. 458 U.S. at 205-06. When Petitioner urges *de novo* trial, it seeks to a review not contained in the Act or in the limitations of the "review" this Court has established. Petition at 15, n.4. An urging of such a broad review denigrates the importance of a prompt and full administrative hearing, encouraging litigants to withhold evidence for trial.

While presenting an illusory conflict among the circuits, Petitioner argues that review by the Supreme Court is

necessary as IDEA is a federal act, ultimately reviewed in federal court, thus presenting a need for a uniform explicit federal standard of review which allows federal consideration of the services provided and uniform federal review of the state administrative mechanism. Petition at 10, 16. Petitioner's argument for uniformity does not account for the duty of "due deference" to the state's administrative hearing decision, *Rowley,* 458 U.S. at 204-06, and also ignores the reality of the special education system. Petitioner is correct that some states have discovery in the administrative court and some do not. Some states have one-tier hearing processes, i.e., one administrative trial and then appeal to court, whereas other states have administrative trial, then administrative appeal, and then appeal to the courts for *de novo* review. These differences are part of the cooperative federalism of the Act arising from the Congressional intent to allow the states to manage and regulate much of the special education system. *Rowley*, 458 U.S. at 207-08. Some states have different delivery systems, some states include mental health agencies in the IEP processes, some states have different forms of regional schools, some states supplement the IDEA mandates with extensive state rules, but all allow issues arising from their system to be adjudicated in the administrative proceeding. IDEA allows these distinctions from state to state and these, in turn, require a flexible discretionary multi-factor test to guide a court's discretion. A singular standard urged by Petitioner would be antithetical to the design of IDEA.[3]

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3. A close legal analogy is that IDEA does not have a statute of limitations and, therefore, lower courts have followed this Court's guidance and borrowed the closest analogous statute from the forum state and tested that against whether or not it conflicts with the policies underlying the IDEA. This has led to the use of differing (Cont'd)

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER THERE MUST BE A UNIFORM STANDARD TO REGULATE THE ADMISSION OF ADDITIONAL EVIDENCE

Petitioner argues that this case should be reviewed to resolve the conflict it constructs between the First and Sixth Circuits on the meaning of additional evidence and the standard for its use under 20 U.S.C. § 1415(i)(2)(B)(ii). Petitioner's urging of unfettered admission of additional evidence reduces IDEA's evidence provisions as only limited by restrictions permitted under the Federal Rules of Evidence. Petition at 18. Even under this argument, however, review by this Court is not appropriate as the evidence sought for admission was inadmissable under the Federal Rules of Evidence. Petitioner's request for review does not seek review of the trial court's finding under the Federal Rules of Evidence. Moreover, any asserted conflict among the circuits dissipates when one reviews *Cook, Burlington and Bennett* within the context of the Federal Rules of Evidence. In the instant case, the trial judge exercised his discretion by declining to admit nineteen pieces of evidence relying on his interpretation of the "additional evidence" standard. Under the Federal Rules of Evidence, however, those same nineteen pieces of evidence are inadmissible for essentially the same reasons.

(Cont'd)
statutes depending on whether it is, by example, a substantive claim or an attorney fee claim. The borrowed statute of limitation also will differ from state to state. This lack of uniformity has never required uniform federal limitations periods and is a strength as the litigation of IDEA claims in federal and state courts conforms itself to that forum state's experience and softens the differences in the choice between forums.

A. Rule 403 and Cumulative Evidence

The district court excluded twelve pieces of "additional evidence" holding that the evidence was cumulative or repetitive. Petition at 90a-101a. In carefully analyzing each piece of evidence, the trial court noted that many of the proposed witnesses had either testified at the administrative hearing or would have offered testimony that was identical to testimony previously offered by other witnesses at the administrative hearing. *Id.* Under Rule 403, the trial court has the broad discretion to exclude relevant but cumulative evidence.[4] *Johnson v. C.F. Ashby, M.D.*, 808 F.2d 676, 678 (8th Cir. 1987); *United States v. Hooton*, 662 F.2d 628, 636 (9th Cir. 1981); *United States v. Mock*, 640 F.2d 629, 632 (5th Cir. Unit B 1981). Evidence that merely corroborates previously admitted evidence or repeats facts already in the record carries slight probative value thereby justifying exclusion of the evidence. *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *Nat'l Post Office Mailhandlers, Watchmen, Messengers and Group Leaders Div. v. U.S. Postal Serv.*, 751 F.2d 834 (6th Cir. 1985). Such limitation on the admission of evidence takes into account that a case is not won solely by the party with the greater resources or the most witnesses.

Rule 403's limitations on cumulative evidence applies to Petitioner's proposed use of supplemental expert testimony. While cumulative expert evidence may be relevant

4. Federal Rule of Evidence 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*." Fed. R. Evid. 403(emphasis supplied).

in limited instances, a court may still exercise its discretion to exclude such under Rule 403. *E.g.*, *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1309-10 (11th Cir. 1999). A trial court is not required to hear an expert witness testify twice, or to have three (3) experts testify on the same issues, all with similar credentials and perspectives, and all repetitive of each other. The district court was presented an expert who had testified extensively at the administrative hearing following an extraordinary pre-hearing evaluation of the child and the private facility. Not only did Petitioner seek the re-introduction of this testimony, it sought the admission of a nearly identical expert that Petitioner failed to use at the administrative hearing. Finding no adequate justification for the admission of this cumulative evidence, the trial court denied Petitioner's request. The trial courts' refusal to hear repetitive experts is a proper exercise of its discretion under the Federal Rules of Evidence regardless of the IDEA standard.

B. Rule 401 and Rule 402 of the Federal Rules of Evidence

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 of the Federal Rules of Evidence provides, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." As Petitioner concedes, courts reviewing administrative findings in an IDEA proceeding may look to these two basic rules of evidence to determine the proper scope of "additional evidence." Petition at 18.

Utilizing its traditional role of regulating the proceedings before it, the trial court deemed the proposed testimony of Dr. Lee Marcus and Dr. Ronald Wigley, and the deposition of Denise Bennett, and the testimony of Reba Smith, Debbie Sneed, and Kaye Cannon to be repetitive and cumulative. Petitioner at 90a-91a, 94a-95a, 87a-98a. The court properly noted that the evidence had either been introduced at the administrative hearing or would simply reiterate testimony given at the prior hearing. *Id.* This ruling is consistent with the district court's authority under Rules 402 and 403. Repetition of such evidence would carry no probative value as it does nothing more than restate what has already been asserted. Rule 402 permitted the trial court to exclude this evidence.

Petitioner failed before the district and appellate courts to address the inadmissibility of the proffered evidence under the Federal Rules of Evidence. Thus, without interpreting the "additional evidence" provision in the IDEA, the Federal Rules of Evidence operate to derive the same outcome. As compelling, the most recent cases in the courts of appeals applying the "additional evidence" standard would have also resulted in the same outcomes if the Federal Rules of Evidence were exclusively applied to determine admissibility. *Gill v. Columbia*, 217 F.3d 1027, 1037 (8th Cir. 2000) (court found no abuse of discretion in the trial court not allowing additional evidence when such evidence would merely be cumulative of a complete administrative record); *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 470 (7th Cir. 2000) (the court supported the district court's refusal to allow evidence not probative of the determinative issue in the case.); *Norton v. Orinda Union Sch. Dist.*, 29 IDELR 1068 (9th Cir. 1999) (court supported the trial court's exclusion of expert testimony that

was irrelevant to the eligibility issue in dispute.); *Springer v. Fairfax County School Board*, 134 F.3d 659, 667 (4th Cir. 1998) (court indicated that allowing "additional evidence" would be an "undue waste of time" that disserved the policies underlying the IDEA.); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995) (the court noted the Rule 403 factors of relevance, waste of time, and presentation of cumulative evidence are to be considered by the district court when deciding whether to admit "additional evidence."); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 155 (3d Cir. 1994) (court excluded "additional evidence" holding the proffered testimony to be repetitive, cumulative and irrelevant.); *Metro. Gov't of Nashville & Davidson County v. Cook*, 915 F.2d 232, 234 (6th Cir. 1999) (court held that non-cumulative and clearly relevant evidence was admissible to determine an previously unresolved issue.).

In summary, this case is fully resolved on alternative grounds under the Federal Rules of Evidence. Further review would only represent an advisory opinion and not alter the outcome of the case.

III. THE COURT OF APPEALS PROPERLY CONSTRUED IDEA

The court of appeals construction of IDEA as allowing full administrative adjudication of a child's needs and of requiring discretionary deference to the state tribunal determination is consistent with *Rowley* and the intent of Congress in passing IDEA. Petitioner's suggest that IDEA proceedings are aligned with Title VII of the 1964 Civil Rights' Act cases, 42 U.S.C. §§ 2000e *et seq.* Petition at 15. The most common path to court under Title VII is after an administrative grievance, which may involve an

investigation, but does not afford the full administrative hearing exhaustion as required by IDEA. Thus, the litigant clearly has a right to a trial *de novo*, as there is rarely a record available for review on the preponderance of the evidence standard. In most Title VII circumstances, there are no administrative proceedings below for which to offer deference.

Incredibly, the Petitioner argues that the court of appeal's approach will turn "IEPs into pitched battles . . . [as] then the parties will have to ferret out and incorporate into the administrative record all evidence supporting their arguments and countering those of their opponents." Petition at 16. As a consequence, Petitioner seeks a standard that denigrates the administrative process and allows a party to withhold arguments and evidence from the IEP and administrative decision-making. This would render IDEA's exhaustion requirement irrelevant and allows an undisciplined vehicle to circumvent due deference.

IDEA and its IEP, mediation and hearing processes are premised on the full and collective sharing of information concerning the student and the district's services. The Act guarantees the parent the right to informed consent, *i.e*, consent educated with a full airing of information and issues. 34 C.F.R. § 300.500(b)(1) ("consent means that — [t]he parent has been fully informed of all information relevant to the activity for which consent is sought"). Evaluation decisions are required to take place collectively with all arguments and counter-arguments presented. 20 U.S.C. § 1414(a)(1)(C). The key to the operation of the IEP team is that a district is obligated to give all the reasons and supportive data for the position it takes and all the reasons and supportive data for its rejection of the requests made by the parent. 34 C.F.R. § 300.503(b)(1)-(7). This frames the

issues in the hearing and the decision of the court of appeals supports directly the operation of this established process. Whether an IEP is a "pitched battle" depends on the relationship of the parties, not the standard of additional evidence in district court. A good faith IEP must rely on the disclosure of information. "We think the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of the IEP". *Rowley*, 458 U.S. at 205-206. The attempt to reward one party for withholding evidence from the administrative hearing to use at trial will, in some cases, adversely impact educational decisions for disabled children and is a construction of this law that is unsupported.

The Petitioner eventually argues that the language of 20 U.S.C. § 1415(i)(2)(B)(ii) was intended to restrict the court's discretion to deny admission of evidence. Petition at 18. To support this they cite language from *Rowley*, 458 U.S. at 190 n.11, but this is part of this Court's response to the dissent in its review of the meaning of "appropriate" education, not a discussion of the scope of district court review. The better rule is that supplemental to the traditional rules of evidence is the substantive statute and a case-by-case review of the claims, evaluated by a multi-factor exercise of discretion. This gives meaning to the process, does not codify gamesmanship and balances the needs of school districts with the rights of the family and student. Petitioner's strained construction would undo twenty-two years of evolution of the special education practice, exulting form over substance and push case after case into the federal courts.

CONCLUSION

The court of appeals adopted a multi-factor consideration for a district court's discretion on the admission of additional evidence. This allows the court to manage the evidence, gives deference to the administrative decision, and allows appropriate additional evidence. There is no conflict among the circuits on the issue of additional evidence. Rather, all circuits utilize a multi-factor analysis balanced by the discretion of the court and the deference mandated by this Court in *Rowley*.

Respectfully submitted,

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No. 00-527

IN THE

Supreme Court of the United States

WALKER COUNTY SCHOOL DISTRICT,

Petitioner,

v.

JENSISNE BENNETT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Respondents make three principal arguments in opposition to the petition for certiorari in this case: *First*, they argue that there is no "meaningful conflict" among the courts of appeals concerning the standard for the admissibility of "additional evidence" in a civil action challenging a state administrative decision under the Individuals With Disabilities In Education Act ("IDEA"), because in all circuits, the trial courts "make a discretionary determination of admissibility of evidence." Opposition ("Opp.") at 8. *Second*, they contend that there is no federal interest in a uniform interpretation of the IDEA requirement that the court "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(B)(ii); Opp. at 8. *Third*, they maintain that, even if a conflict exists, this case is not a perfect vehicle for its resolution, because the evidence at issue here could have been excluded, in any event, under Federal Rules of Evidence 401, 402, and 403. Opp. at 8. All of these arguments are entirely without merit, as we now show; and this Court should grant the petition to resolve a fully-developed conflict on an important and recurring question of federal law.

1.(a) In the Petition, we demonstrated that, in this case, the Eleventh Circuit interprets the IDEA requirement that the district court "shall hear additional evidence at the request of a party" to mean only that the district court may, in its discretion, hear "supplemental" evidence proffered by a party. App. 10a (adopting the standard of *Town of Burlington* v. *Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984)). In doing so, the Eleventh Circuit joined the Fourth, Seventh and Ninth Circuits, which also apply the *Town of Burlington* test. The Sixth Circuit has carefully considered the reasoning of *Town of Burlington*, however, and expressly declined to adopt it. It has opted instead to employ the statute's plain meaning, saying "[t]o 'add' means to join or unite; the limitation on

what can be joined inherent in the term 'supplement' is not present in the term 'add.'" *Metro. Gov't of Nashville & Davidson County* v. *Cook*, 915 F.2d 232, 234 (6th Cir. 1990). The Third Circuit has strongly intimated that it will construe the phrase "additional evidence" as broadly as did the Sixth Circuit in *Cook*. See Petition ("Pet.") at 12. There is, accordingly, an acknowledged conflict about the correct meaning of the statutory requirement that "[i]n any action brought under this paragraph, the court . . . shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(B)(ii).

Respondents characterize this conflict as one of "semantics" that is "neither functional nor outcome determinative." Opp. at 9. It is unclear whether respondents mean that this conflict in statutory construction *cannot* make a difference in what evidence is considered or that it *has not* made a difference, but in either event, respondents are wrong. Under *Town of Burlington*, a party cannot introduce evidence in its civil action challenging an IEP if that "evidence" is part of the record in the administrative proceeding. In this case, as in other cases adopting the *Town of Burlington* standard, the district court gave the word "evidence" a broad interpretation, forbidding the School District to introduce testimony from witnesses who previously testified, forbidding the School District to introduce testimony from new witnesses if that testimony is on the same "topic" as the testimony of a witness who testified at the administrative hearing, and forbidding the School District to introduce evidence that could have been introduced (but was not) at the administrative proceeding. App. 87a, 89a-90a. See, *e.g.*, 91a (refusing to hear testimony from the School District's expert, addressing the School District's "concern[] about the administrative hearing officer's determination as to Dr. Marcus' credibility" by "assur[ing] Plaintiffs that the Court has before it the transcript of Dr. Marcus' testimony . . . and is quite capable of making its own determination as to Dr. Marcus' credibility"); 92a (refusing to admit Dr. Freeman's testimony, although he did not testify

during the administrative proceeding, on the ground that "permitting Dr. Freeman to testify despite the absence of any showing [that he] was unavailable to testify at the administrative hearing effectively would permit Plaintiffs to reserve their best evidence for trial" and on the ground that it is "cumulative"); *id.* at 94a (refusing to admit testimony of Ms. Bailey on same grounds); *id.* at 95a-96a (refusing to admit testimony of John Bennett on same grounds); *id.* at 100a (refusing to admit testimony of Ms. Driggers on same grounds); *id.* at 102a-103a (refusing to admit evidence because another witness testified at the administrative hearing "about these issues"); *id.* at 100a, 105a (refusing to admit noncumulative testimony of Ms. Cannon, Ms. Lesperance, Ms. Drennan because the School District had not explained why it did not call these witnesses at the administrative hearing).

In addition, the district court admitted certain documents not part of the administrative record, casting substantial doubt on a major reason for the administrative decision that the public school placement was inappropriate. App. 32a. But the court refused to allow testimony about the significance of this evidence from the School District's witnesses or cross-examination of the respondents' witnesses based on the new documentary evidence.[1]

Plainly, under the broader *Cook* standard, evidence that was not proffered during the administrative hearing – *i.e.*, much of the evidence proffered here – would virtually always be admitted in the ensuing civil action. Moreover, evidence that was, in substance, in the administrative record would be admitted if the witness's credibility were at issue or if new evidence affected that witness's testimony or required addit-

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[1] The district court's admission of documents from Orange Grove that were not provided during the administrative hearing demonstrates that respondents' statement that the School District had "all records" five days prior to the administrative hearing (Opp. at 6) is simply wrong. Critical documents were not provided until discovery in the district court case.

ional cross-examination of that witness. The *Cook* test is faithful to the meaning and connotation of the statutory requirement that the court "shall hear additional evidence at the request of a party," because it allows the party to shape its evidentiary challenge to the administrative determination in a case by offering relevant evidence in addition to the administrative hearing record. In contrast, as this case illustrates, the *Town of Burlington* test gives the court virtually unfettered discretion to exclude evidence – on the grounds that: (i) the witness was available to be called at the administrative hearing; (ii) other witnesses testified on the same topic at the administrative hearing; (iii) the court can evaluate credibility from a transcript; (iv) all cumulative testimony is irrelevant; and (v) new documentary evidence does not warrant additional, explanatory testimony or cross-examination. Plainly, there is both a theoretical and a practical conflict between the *Town of Burlington* and *Cook* standards that should be resolved by the Court.

(b) Respondents next attempt to argue that *Town of Burington* is actually a flexible, multi-factor test that would allow the admission of evidence in all necessary circumstances. Opp. at 9. This case belies that contention. Equally to the point, the passage cited by respondents demonstrates the narrow scope given to the statutory requirement that the court "shall hear additional evidence at the request of a party." In their view, *Town of Burlington* allows for "the unavailability of witnesses, mechanical failures as to the transcript, the improper administrative exclusion of evidence and evidence of relevant subsequent events." Opp. at 9-10. *Town of Burlington* thus places a substantial burden of unavailability and necessity on a party seeking to introduce evidence in a challenge to a state administrative decision; that burden simply cannot be reconciled with the statutory language and structure. See also *Indep. Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 560-61 (8th Cir. 1996) (requiring "solid justification" to allow evidence other than the administrative record); *Monticello*

Sch. Dist. No. 25 v. *George L.*, 102 F.3d 895, 901-02 (7th Cir. 1996) (refusing to admit evidence other than the administrative record because there were no procedural errors by the administrative decision maker); *Springer* v. *Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998) (refusing to admit evidence to "patch up holes in the[] administrative case").[2]

Nor can *Cook* be read, as respondents read it, to endorse the limitations of *Town of Burlington*. The *Cook* court expressly declined to adopt *Town of Burlington*'s narrow construction of the requirement that the courts hear additional evidence, and simply suggests that *even* the *Town of Burlington* court might have allowed the testimony it was admitting. See *Cook*, 915 F.2d at 235.

Respondents are quite right that under both *Town of Burlington* and *Cook*, the trial court has discretion about whether to admit evidence in a civil action under the IDEA. Opp. at 11-12. But the IDEA makes clear that the court's discretion is simply that generally possessed by a trial judge in a civil action. A trial court does *not* have discretion, as *Town of Burlington* holds, to place the burden of justifying the admission of relevant evidence on the party challenging the administrative result and to exclude vast quantities of concededly relevant evidence on policy grounds. Only the *Cook* test is faithful to the statutory language and structure.

(c) Finally, respondents' suggestion – that the *Cook* test is inconsistent with this Court's instruction that reviewing courts give "due weight" to the administrative record and not substitute their judgment for that of the state educational authorities – is wrong. The IDEA itself requires the court to

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[2] *O'Toole* v. *Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 708-09 (10th Cir. 1998), is not relevant here. It does not discuss or adopt either the *Town of Burlington* or *Cook* standard; it simply affirms a district court's denial of a motion for the enlargement of time to submit additional evidence where counsel had provided no explanation for his failure to timely file.

hear additional evidence, to base its decision "on the preponderance of the evidence," and to grant the relief "the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(ii) & (iii). In the civil action the administrative record and additional evidence are thus weighed by the court *de novo*. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) (although the employee's discrimination claim had been arbitrated, the court must "consider the employee's claim *de novo*" and "accord[] [the arbitral decision] such weight as the court deems appropriate").

* * * *

There is a meaningful and important difference between the conflicting tests employed by the courts of appeals, and this conflict goes to the heart of the statutory review process of the IDEA. Because *Town of Burlington* sets a very high standard for the admissibility of evidence other than the administrative record, civil actions challenging state IEP decisions under that standard are akin to petitions for review of agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), decided on the administrative record. *Cook*, in contrast, recognizes that the IDEA does not limit a party to an appeal or petition for review of the state administrative decision, but rather authorizes a party to bring a "civil action" and to create a record in addition to the administrative record, 20 U.S.C. § 1415(i)(2). The difference in evidentiary standards means that different evidence will be admitted in civil actions conducted within different circuits. Different records will often lead to different results in the *de novo* proceedings required under this Court's decision in *Rowley*, 458 U.S. at 205. This is an important and outcome determinative conflict about the meaning of a federal statute that should be resolved by this Court.

2. In the Petition, we showed that the question presented here is recurring and important. Thousands of IEPs are prepared every year. Many of these IEPs are challenged in state

administrative proceedings and become the subject of litigation in state and federal courts; in virtually every such case, the court must construe the statutory requirement that it hear "*additional evidence at the request of a party.*" *20 U.S.C.* § 1415(i)(2)(B)(ii). Respondents do not dispute that the issue is recurring, but they contend that there is no significant interest in having a uniform interpretation of the statutory requirement and, indeed, that "[a] singular standard urged by Petitioner would be antithetical to the design of IDEA." Opp. at 15. This is plainly wrong, and the amicus curiae brief of the National School Boards Association ("NSBA"), *et al.*, demonstrates clearly the overriding need for uniformity in this context.

There is no conceivable benefit, but there is substantial harm arising from the existence of conflicting interpretations of the IDEA. In enacting the IDEA, Congress balanced its interest in funding free, appropriate education for disabled students with its intent to leave decisions about education policy and practices with the states. *Rowley*, 458 U.S. at 200-04, 207-08. Congress thus created a dispute resolution process that allows substantial variation in state administrative proceedings, but also places the judiciary in an important role by allowing aggrieved parties to file civil actions challenging the results of these varied state proceedings. Put differently, Congress' enactment of federal law governing certain aspects of IEP review *precisely shows* where uniformity, rather than state-law variation, is necessary. Moreover, the structure of the IDEA makes clear that the judicial review mandated by the statute is a safeguard to vitiate, where necessary, the effects of the varied state procedures and to ensure that the strong federal interest in the appropriate expenditure of federal funds is served. See Pet. at 16-17. That is particularly necessary because the administrative processes of some States, such as Georgia, the State at issue, do not authorize

discovery during IEP administrative proceedings.[3] It thus makes no sense to argue, as respondents do, that there is no interest in uniform judicial standards governing IDEA actions, because the statute allows variation in the state administrative schemes.[4]

Finally, respondents' contention entirely overlooks the fundamental unfairness that a lack of uniformity imposes on children, parents, and school districts. The federal rights of students, parents and school districts should not depend on geography or on whether the party challenges the IEP determination in federal or state court. It is, in short, respondents' proposal – that the conflict remain unresolved – that is "antithetical to the design of IDEA" (Opp. at 15) and inconsistent with Congress' creation of a civil action governed by federal law.[5]

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[3] Respondents acknowledge that Georgia does not allow discovery during IEP administrative proceedings. Opp. at 4. Respondents contend, however, that the School District had discovery because its expert was permitted to observe Jensine Bennett at her private placement. *Id.* at 5. The fact that the School District's expert was permitted to observe Jensine (despite respondents' objection) does not mean that the School District was not prohibited from conducting discovery, as respondents assert; the School District's expert did not meet with Jensine's teacher or have access to all Orange Grove records. In fact, as noted above, the School District was not able to obtain significant evidentiary materials prior to the hearing.

[4] Respondents do not deny that their restrictive definition of "additional evidence" would have the consequence of forcing state administrative proceedings to be more adversarial. They allege, however, that the School District's construction and the plain meaning of the IDEA would allow a party to withhold arguments and evidence during the administrative process to sandbag the opposing party in the court case. Opp. at 21. The incentives to withhold strong evidence, and thus to decrease one's chances of success in the less expensive, less adversarial administrative process, are vanishingly small, however. Almost all parents or school districts will prefer to win sooner, rather than later.

[5] In support of their argument that there is no interest in a uniform interpretation of section 1415(i)(2)(B) of the IDEA, respondents point out that the IDEA lacks a statute of limitations and thus borrows a limitations

3. Respondents' argument that the evidence proffered by the School District would have been excluded under the Federal Rules of Evidence is both new and wrong. Neither the trial court nor the court of appeals even intimated that the evidence was excluded on this basis, nor could it have been.

First, respondents argue that twelve of the 19 items of evidence at issue were excluded as cumulative under Federal Rule of Evidence 403. Opp. at 17. Even on respondents' count, however, that leaves seven items of evidence wrongly excluded. On any fair reading of the trial court's opinion, moreover, it excluded the evidence *not as cumulative under Federal Rule of Evidence 403, but as cumulative in light of the standard for admissibility set in Town of Burlington.* App. 86a-105a. Finally, even respondents admit that the exclusion of cumulative evidence under Rule 403 is a matter of discretion, and the trial court here did not exercise its discretion under the Rule. Indeed, few courts would have excluded the proffered evidence under Rule 403. A cumulation of relevant evidence in support of a particular point in dispute is undeniably probative, and evidence is generally excluded as cumulative only when it does not go to the crux of a disputed issue or when so much evidence has already been admitted that an additional item can have little effect. That is plainly not the case here.

Second, respondents appear to argue that the evidence proffered by the School District was not relevant under Federal Rules of Evidence 401 and 402. Opp. at 19-20. Again, neither the trial court nor the court of appeals addressed or excluded the evidence on this basis. The evidence is plainly relevant as that word is defined in Rule 401 (relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the deter-

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period from state laws. That is precisely the point. The IDEA does not mandate a statute of limitations; in contrast, here, the IDEA *contains* a statutory provision mandating the hearing of additional evidence in the civil action.

mination of the action more probable or less probable than it would be without the evidence"). Respondents' contention seems to be that evidence that is cumulative is also irrelevant, although they cite no authority in support of that proposition. In any event, as stated above, even respondents do not contend that all of the proffered evidence is cumulative or irrelevant (nor could they, see, *e.g.*, 100a (Ms. Cannon); 105a ("other issues" to be testified to by Ms. Lesperance); *id.* (Ms. Drennan)). Finally, respondents are simply wrong that this evidence would be excluded as cumulative, see *supra*.

The trial court refused to hear relevant additional evidence proffered by the School District, and that decision was affirmed by the court of appeals, relying upon *Town of Burlington*. This case thus squarely presents the question of the meaning of the IDEA requirement that, in a civil action challenging a state administrative decision concerning an IEP, a court "shall hear additional evidence at the request of a party" 20 U.S.C. § 1415(i)(2)(B)(ii).

* * * *

As set forth in the Petition, the court of appeals incorrectly construed an important federal statute, wrongly decided a recurring question of federal law, and added to an existing, mature conflict among the courts of appeals. Indeed, this conflict is part of the widespread "confusion as to the exact nature of the IDEA proceedings before the district courts." *Kirkpatrick* v. *Lenoir County Bd. of Educ.*, 216 F.3d 380, 385 & n.4 (4th Cir. 2000). This Court should grant the petition to dispel the confusion and resolve the conflict on this important and recurring question.

CONCLUSION

For the reasons stated above and those stated in the petition and the amicus brief of the NSBA, the petition for certiorari should be granted.

Respectfully submitted,

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